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A Legal Conundrum — Transsexuals in Athletics

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Introduction

Transsexualism,¹ the phenomenon of lifelong, extensive cross-

1. A transsexual is an individual anatomically of one sex, who believes firmly in spite of all physical or genetic evidence to the contrary that he, (or she) is inherently of the opposite sex. The transsexual has a fixed and apparently unalterable belief that he is one sex, "trapped in the body of the other". Donald, *The Sex Conversion Controversy*, 271 NEW ENGLAND J. MED. 535 (1968).

The transsexual views his sex organs, male body forms, hair distribution, masculine habits, male dress and male sexuality with disgust and hate. He lives only for the day when his "female soul" is no longer in conflict with his male body—when he can function as a female, socially, legally and sexually. H. BENJAMIN, *THE TRANSSEXUAL PHENOMENON* 19 (1966). [hereinafter cited as *TRANSSEXUAL PHENOMENON*].

The condition known as transsexualism is generally considered to be psychiatric, i.e., having roots in early emotional development. Donald, *supra* note 1. Others feel that genetic and hormonal influences predispose the newborn to either a male or female identity and therefore an error in the genetic code and resulting hormonal balance could be responsible for the transsexual syndrome. *Transsexualism*, 2 MED. J. AUST., 251-52 (1973).

Nevertheless, the conviction that the individual has the anatomical configuration of the wrong sex is manifested very early in life, usually by age four or five. Pauly reports that two-thirds of a group of transsexuals felt that they belonged to the opposite sex by age five, Pauly, *Adult Manifestations of Male Transsexualism* in GREEN & MONEY, *TRANSSEXUALISM AND SEX REASSIGNMENT* 41 (1969) [hereinafter cited as *GREEN & MONEY*], while Green reports six case histories of adult transsexuals whose cross-gender identification and behavior date back to three years of age or younger. Green, *Childhood Cross-Gender Identification* in GREEN & MONEY at 34-35.

Transsexuals should not be regarded as homosexual. The male transsexual feels himself to be a woman and is sexually attracted to men. Strictly speaking, this makes him a homosexual provided his sex is determined from the physical appearance of his body. But he, diagnosing himself in accordance with his psychological orientation as a woman, considers his sexual desire for a man to be heterosexual, that is, normal. *TRANSSEXUAL PHENOMENON*, at 19.

Transsexualism has resisted all known psychological and psychiatric treatment. Generally the patients have no motivation for psychotherapy and do not want to "change back" to their biological sex. "Numerous attempts at therapy including intensive psychoanalysis, hypnosis, aversion deconditioning, chemotherapy and behavior therapy have been generally unsuccessful." Pauly, *The Current Status of the Change of Sex Operation*, 147 J. NERVOUS AND MENTAL DISEASE 460, 465 (1968).

Currently, the only means to harmonize the transsexual's physical sex and psychological sex is through hormonal therapy and (often) a sexual change operation. *Id.* at 463. If conversion surgery is not readily available, the transsexual may attempt self-castration, other mutilating acts, suicide, or he may fall into a reactive psychosis. Such self-abuse is not rare, as Pauly has reported. See Pauly, *Problems of Sex Determination and Alteration*, 36 MEDICO-LEGAL J., 174 (1968).

gender² identification, is not new to either our culture or our time.³ Many sources point to the long-standing and widespread⁴ pervasiveness of the transsexual anomaly. However, until recently the law has been reluctant to recognize and respond to the needs of transsexuals, assuming a passive rather than a facilitative role.⁵ Only in this decade has the law accepted the challenge, setting forth legal precedents that will assist a transsexual's adjustment in society once he/she has assumed a new gender role. Recently, attention has focused on the issue of whether male transsexuals⁶ and others with chromosomal anomalies should be denied the right to participate in sex-segregated athletics. The focus of dispute is the disparity between their chromosomal composition (which would designate them as male) and physical appearance (which effectively simulates feminine appearance and would designate them as female). In response to this dilemma, the International Olympic Committee adopted a chromosomal test of sex.

2. Sex is a term which refers to a matter of anatomy and physiology, hence male and female are sexual terms. This is distinguished from gender which refers to a mixture of inborn and acquired traits (learned characteristics). Masculine and feminine are therefore expressions belonging to the gender concept. *TRANSSEXUAL PHENOMENON*, at 18.

3. Anthropologic studies have revealed that "in nearly every part of the continent there seems to have been, since ancient times, men dressing themselves in the clothes and performing the functions of women." Green, *Mythological, Historical, and Cross Cultural Aspects of Transsexualism* in *GREEN & MONEY*, at 18.

Philo, the Jewish philosopher of Alexandria wrote of those who were grossly discontent with their gender role, "[e]xpend[ing] every possible care on their outward adornment, they are not ashamed even to employ every device to change artificially their nature as men into women . . . Some of them . . . craving a complete transformation into women, they have amputated their generative members" *Id.* at 14-15.

4. Pauly reports that the prevalence of male transsexualism is 1:100,000 of the general population, while the prevalence of female transsexualism is approximately 1:130,000. Pauly, *Female Transsexualism: Part I*, 3 *ARCHIVES OF SEX BEH.* 487, 493 (1974).

"Transsexualism is undoubtedly more common than these figures suggest for they are based on only those transsexuals who are under a stress sufficient to have them come to medical attention. Whatever the exact prevalence may be, it is obvious that transsexualism is more common than heretofore appreciated." Pauly, *Adult Manifestations of Male Transsexualism* in *GREEN & MONEY*, at 57.

5. Because of their ambiguous sexual status, transsexuals' sexual activities may fall within the conduct proscribed by perverted practice statutes which have been used to prohibit homosexual acts. Since violation of these statutes depends upon the sexual identity of the accused, it becomes necessary for society to determine the transsexuals' legal sex. Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 *MD. L. REV.* 236 (1971).

In writing on the legal aspects of transsexualism Sherwin says that "[t]he problem . . . becomes even more aggravated and complex because the behavior of the transsexual resembles often certain forms of behavior that are defined as a crime by our criminal statutes." Sherwin, *Legal Aspects of Male Transsexualism* in *GREEN & MONEY*, at 417.

6. A male transsexual has the anatomical make-up and chromosomal constitution of a male, but believes he should be a female. A female transsexual has the anatomical make-up and chromosomal constitution of a female, with the belief that she should be a male.

Ewa Kobukowska, a 21 year old Polish track competitor, was the first athlete to publicly fail the International Olympic Committee's test of sexual identity. She was ruled ineligible for the 1967 European Cup Women's competition after a six-man medical commission detected the presence of the male, or Y chromosome.⁷ In 1968, her name was removed from the record books and the gold and bronze medals she had won in the 1964 Olympics were taken away by the International Amateur Athletics Federation.⁸

In response to the situation presented by individuals with ambiguous sexual characteristics that made their sexual designation difficult, the United States Tennis Association and Women's Tennis Association adopted the chromosomal test used in the Olympics, as a condition of participation in the Women's Division of the 1976 United States Open Championship.

Dr. Renee Richards, a 43 year old postoperative male transsexual previously known as Dr. Richard Raskind, sought to suspend the required chromosomal test so that she could compete as a woman in the Women's Division of the 1977 U.S. Open. By September 1, 1977, Dr. Renee Richards had obtained a preliminary injunction suspending the required chromosomal test, and was allowed to play third-seeded Virginia Wade in the women's singles of the United States Open Tennis Championship.⁹ Dr. Richards lost the match but emerged triumphant, having won a significant legal battle. Never before had a male-to-female transsexual (phenotypically female while chromosomally male) been permitted to compete against an undisputed female. This ruling was in direct contravention to the widely employed "Olympic Test" which determines the sex of an athlete on the basis of chromosomal composition.

The object of this note is to examine the question before the courts and international athletic associations today: "Should male transsexual athletes¹⁰ be allowed to compete against their 'normal' female counterparts in athletic competitions?" This note will examine the medical criteria essential to a determination of sex and discuss their appropriateness in formulating a viable medical definition of sex for

7. *A Former Male Tennis Player Seeks to Join Women's Tour*, N.Y. Times, July 24, 1976 at 16, col. 6.

8. *Id.*

9. *Stormy Summer of Controversy at Forest Hills*, N.Y. Times, Aug. 28, 1977, § 2 at 17, col. 1.

10. For practical purposes, this note will deal with male-to-female transsexuals. To date, sports competitions have not had to cope with problems presented by female-to-male transsexual competitors.

transsexuals. Next, it will explore the application of these tests in the legal milieu, indicating which factors have been important in formulating a legal definition of sex. Finally, this note will explore the policy of the International Olympic Committee, which has adopted a chromosomal test of sex for athletic purposes. This position is contrasted with the decision reached in *Richards v. United States Tennis Association*¹¹ which ostensibly set forth a psychological/phenotype test for purposes of classifying transsexual athletes.

Toward A Definition of Sex

Legal relations can be classified as those in which the sex of the individual concerned is either irrelevant, relevant, or an essential determinant of the nature of the relationship.¹² The criterion of sex is relevant to retirement under social security regulations, differential ratings for life insurance purposes, possible marital benefits, and rights of inheritance. Penal violations may also be involved¹³ under vagrancy statutes or disorderly conduct statutes.¹⁴

Sex is also relevant to proper classification for sex-segregated athletic events. Evidence establishes that the male body has a competitive advantage over the female physique founded upon anatomical differences. This has been revealed by a statistical comparison between male and female performance ratios in athletic events.¹⁵ Consequently, athletic events are sexually segregated in those sports where sexual differences in musculature strength, height, and skeletal proportions may affect athletic performance.¹⁶

These differences in sex are used to justify the various rules estab-

11. 400 N.Y.S.2d 267 (1977).

12. *Corbett v. Corbett* (otherwise Ashley), [1970] 2 All E.R. 33, 48.

13. *In re Anonymous*, 314 N.Y.S.2d 668, 670, 64 Misc. 2d 309, 311 (1970). See *supra* note 5.

14. Sherwin, *supra* note 5, at 417. For a fuller discussion of this problem see Note, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288 (1975); Note, *Transsexuals in Limbo: The Search For a Legal Definition of Sex*, 31 MD. L. REV. 236 (1971); Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963 (1971).

15. Hay reports a difference of effort and endurance between the sexes of 10-18 percent in track, 20 percent field, and a 15 percent difference in swimming the breast and butterfly stroke, due to anatomical differences. Hay, *Sex Determination in Putative Female Athletes*, 221 JAMA 998 (1972). See also Crawford, *Male and Female Olympic Records*, 105-106 OLYMPIC REV. 367 (July-Aug. 1976).

16. Sexual differences are irrelevant in equestrian, yachting and shooting events at the Olympic Games, hence no separation on the basis of sex is made in these sports. *Experts Say Competitive Advantage Holds for MD Tennis Star Despite Sex Change*, Medical Tribune, Sept. 22, 1976.

lished by international and national sports federations and the International Olympic Committee to ensure femininity of participants in sex-segregated events (in order to eliminate any potential competitive advantage). Generally, participants are required to undergo "femininity tests" which determine the chromosomal make-up of the individual.¹⁷ However, some members of the medical community have criticized the use of these chromosomal tests in regard to persons with sexual abnormalities. Their reasoning is that no single index or criterion can be determinative of the true sex for such an individual and that another standard should be established.¹⁸

Toward A Medical Definition of Sex

A person's "core"¹⁹ sex is determined at conception when the X or Y chromosome in the fertilizing sperm couples with the X chromosome present in the ovum. A female will develop when two X chromosomes meet and a male will develop when the combination is XY.²⁰ However, a genetic error in chromosomal coupling or mistake in hormonal balance²¹ may produce an individual with an ambiguous sexual status.²² Consequently, medical science has resorted

17. The "femininity test" of chromosomal gender was first administered for international competition at the time of the 1966 European Track and Field Championships. Letter to the author from the United States Olympic Committee (Sept. 12, 1977).

At the 10th Winter Olympic Games in Grenoble in 1968, a small percentage of female athletes were chosen at random to undergo femininity tests. Now all women participants in the Olympics must undergo these femininity tests as a prerequisite to competition. Hay, *supra* note 15, at 998. See *International Olympic Committee Medical Controls*, Rule 4.4-4.4.13. See also notes 109-121 & accompanying text *infra*.

18. Moore, *The Sexual Identity of Athletes*, 205 JAMA 787-88 (1968).

19. The term "core sex" (for the purposes of this note) refers to chromosomal sex which is established at conception.

20. J. MONEY, *SEX ERRORS OF THE BODY*, 15-21 (1968) (cited in Note, *supra* note 5, at 236 n. 5).

21. There is evidence that the active process of sexual differentiation in the developing fetus is dependent upon circulating hormones. It is believed that the mammalian Y chromosome contains a gene or genes with a greater proportion of DNA responsible for androgen circulation and testicular development. It is postulated that androgen acts upon the brain to program patterns of maleness or a male central nervous system which is responsible for testicular development. In the absence of this secretory process, the indifferent fetal tissues will assume their natural course and develop into an ovary. Female development is not contingent on the presence of an ovary since development of the uterus and tubes will occur even if no ovary is present. Levine, *Sexual Differentiation: The Development of Maleness and Femaleness*, 114 CALIF. MEDICINE 12-17 (1971). See Mittwoch, *Do Genes Determine Sex?*, 221 NATURE 446 (1969). This position is consistent with the hypothesis espoused in *supra* note 1, that transsexualism is caused by a hormonal and/or genetic error.

22. For example, such syndromes may include Klinefelter's Syndrome: a sterile male having 47 rather than 46 chromosomes with an XXY chromosome pattern instead of the usual XY pattern; Turner's Syndrome: a sterile female lacking a chromosome, exhibiting an XO pattern as opposed to the usual XX chromosome pattern; Metafemale: a female having an

to a number of factors germane to sex identification. A listing of factors relevant to sex classification of an individual include the following:²³

- 1) Gonadal Sex (testes or ovaries)
- 2) Hormonal Pattern
- 3) Internal Genitalia (other than gonads, e.g., uterus or sperm ducts)
- 4) External Genitalia
- 5) Secondary Sexual Characteristics (e.g., facial hair, breasts, etc., which depicts the phenotype)
- 6) Apparent Sex (or sex of assignment and rearing)
- 7) Psychological Sex or Gender Identity
- 8) Sex Chromosome Constitution

Naturally, in a "normal" person all of these factors would be in accord. However, the relative importance of each factor becomes more complex and the classification of the sexual status of the individual more difficult where sexual abnormalities are present. This can be illustrated by a contrast between the relative significance given to these factors in the case of hermaphrodites and transsexuals.

Hermaphroditism is a congenital condition of ambiguity of the reproductive structures where the sex of the individual is not clearly defined as exclusively male or exclusively female.²⁴ The hermaphrodite will present an ambiguous pattern of sexual identity under these factors. He may exhibit the external genitals and secondary sexual characteristics of one sex but an inconsistent gonadal and chromosomal make-up. The medical authorities attempt (often unsuccessfully) to assign the sex of these persons in accordance with their chromosomal/gonadal designation.²⁵ In the case of the trans-

extra X chromosome, and therefore displaying a XXX pattern. J. MONEY & A. EHRHARDT, *MAN AND WOMAN, BOY AND GIRL* 29-35 (1972) (cited in Note, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 291 n. 8 (1975)).

23. This list is patterned after one cited in Moore, *supra* note 18 and quoted in Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 237 n. 10 (1971); See also Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 965 (1971).

24. By definition, the true hermaphrodite possesses both testicular and ovarian tissue. These unfortunate persons who have the characteristics of both sexes are "assigned" a sex, which frequently is inconsistent with the sex or gender role to which a person gravitates, often with tragic results. Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1968), and *supra* note 2.

25. Green, *Childhood Cross-Gender Identification* in GREEN & MONEY, at 24. ". . . If subsequent discovery reveals that the child reared as a male to be a chromosomal and gonadal female and an attempt is made to reassign the sex as female, it is likely that, if the child is

sexual, prior to hormonal or surgical alteration²⁶ the gonadal, hormonal, genital (internal and external), secondary sex and chromosomal factors are in concurrence and register one sex, while the psychological factor, physical appearance, and possibly apparent sex

older than between eighteen months to three years, the effort at sex reassignment will fail." *Id.*

26. Sex reassignment surgery for the male transsexual is a complex process. The procedure followed at the Johns Hopkins Gender Identity Clinic in Baltimore, Maryland is as follows:

First, the potential patient is thoroughly interviewed, tested and evaluated by a psychiatrist, psychologist and at least one surgeon to eliminate patients suffering from acute anxieties and psychiatric disorders.

Secondly, the patient completes various psychiatric tests. Hormone therapy to effect body changes toward the desired sex direction is begun. Chromosomal, endocrine and other metabolic studies are initiated. On the basis of these results, the staff decides whether or not to advance the patient.

Thirdly, a surgical team composed of gynecologists, urologists and plastic surgeons perform the sex-change operation or series of operations. The surgical procedure for the male transsexual involves removal of the external male sex organs through castration and amputation of the penis. An artificial vagina is created by forming the scrotum into labia-like folds by plastic surgery. Inlay grafting is used to create an artificial vagina which is capable of normal coitus and orgasm.

Lastly, the patient is followed by the staff, probably for the remainder of his life and returns for periodic study, evaluation and if necessary, further treatment. Holloway, *supra* note 24, at 285-86. Meyers, *Problems of Sex Determination and Alteration*, 36 MEDICO-LEGAL J. 174 (1968), W. MASTERS & V. JOHNSON, *HUMAN SEXUAL RESPONSE* 101-110 (1966). See generally Jones, *Operative Treatment of the Male Transsexual* in GREEN & MONEY, at 313-334. See also Money & Schwartz, *Public Opinion and Social Issues in Transsexualism* in GREEN & MONEY, at 261 for an enumeration of the preliminary criteria for sex reassignment surgery at the Johns Hopkins Gender Identity Clinic.

In the less frequent case of the female transsexual, the surgical procedures are more complex and to date have been ineffective in providing the patient with a sexually functional male organ. Holloway, *supra* note 24, at 285. See generally Jones, *Operative Treatment of the Female Transsexual*, in GREEN & MONEY, at 335-54.

For a discussion of a proper informed consent which would relieve the physician performing a sex-change operation from criminal liability for mayhem or possible civil liability, see Holloway, *Transsexuals, Legal Considerations*, 3 ARCHIVES OF SEXUAL BEH. 33 (1974).

Stoller has commented that the sex reassignment operation is not always the panacea the transsexual hopes for. "It is not unusual for transsexual patients to request more and more surgery of various kinds . . . It is characteristic for the true transsexual to push beyond the limits of what is available and settle for nothing less than that which is conceivable." This disturbing polysurgical attitude and the restless striving for the ideal female form caused Stoller to remark: "The general rule that applies to the treatment of the transsexual is that no matter what one does — including nothing — it will be wrong." Stoller, *The Treatment of Transvestitism and Transsexualism*, in Masserman (ed.), VI CURRENT PSYCHIATRIC THERAPIES (1966). See also Pauly, *Adult Manifestations of Male Transsexualism* in GREEN & MONEY, at 47.

Furthermore, the sex change operation may be utilized for disabilities other than transsexualism. For instance, a 3 year old child who was born male underwent a sex change operation due to defendant military physician's alleged negligence in performing a routine circumcision when the child was five months old. The child's genital area had been so badly burned that a specialist suggested that the child's sex be changed to female. [March 2, 1976] 13 VERDICT REPORTS (Jury Verdict Research, Inc.) No. 17.

are discordant.²⁷ Prior to sex reassignment, the transsexual will be classified in accordance with chromosomal sex, while after sex reassignment the transsexual may or may not be reclassified by the psychological/phenotype test. (The latter will depend on the jurisdiction in which the action is brought and the purpose for which the change in sex designation is sought).

Returning to the issue of the sexual determination of putative female athletes, one realizes that a designation of their sex is essential but exceedingly difficult. Utilization of a test which relies on the concurrence of these factors is not accurate in the case of hermaphrodites and transsexuals, as these syndromes are characterized by ambiguous or conflicting factors. The use of a simple majority of agreeing factors would be inconclusive as it incorrectly assumes each factor is of equal significance.²⁸ Therefore, if this method were adopted, hermaphrodites and transsexuals would remain unclassified. As demonstrated above, the relative weight of these eight factors germane to sex classification of an individual will shift with the type of syndrome and will vary depending upon the purpose for which a determination of sex is required. With this context in mind, an examination of the viability of each of these factors pertinent to a determination of sex will be made.

The Gonadal Standard

A gonadal standard relies upon the presence of the ovaries or testes for identifying the sex of the individual; an individual with ovaries would be female, and an individual with testes would be male. However, the gonadal standard is inadequate in regard to sexual designation for both hermaphrodites and transsexuals. Hermaphrodites possess both testicular and ovarian tissue in their gonads, making this standard inapplicable. Furthermore, this standard is without value in the case of transsexuals since the gonadal tissue is removed in sex reassignment surgery, eliminating this as a criterion for sex determination.

27. Some transsexuals may have been reared in an opposite sex pattern. Stoller reports that mothers of male transsexuals actively encouraged and rewarded their sons for dressing and emulating the opposite sex, thereby reinforcing opposite sex behavior. Stoller, *A Further Contribution to the Study of Gender Identity*, 49 *INTERNAT. J. OF PSYCHOANALYSIS* 364-369 (1968).

28. Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 *CORNELL L. REV.* 966 (quoted from Stutte, *Legal Problems Related to Chromosomes, Abnormalities and Intersex*, 33 *ACTA PAEDOPSYCHIATRICA* 241, 242-243 (1966)).

The Hormonal Standard

Sex hormone balance refers to the endocrinological make-up of an individual. Although every person has both estrogens and androgens present in his/her body, it is the relative predominance of estrogens to androgens that is responsible for breasts and rounded contours in women and the androgen to estrogen predominance which is responsible for facial hair and the more pronounced muscle configuration in men. The hormonal test identifies the amounts of androgens and estrogens in the body and identifies sex on the basis of the predominance of one of these hormones.

Sex hormone balance is a mere tangential index of sex and is inadequate as a standard. It can be easily varied by the administration of drugs and by castration, both routine procedures in sex reassignment surgery.²⁹ For example, the ratio of androgens to estrogens in the male transsexual is typically altered by ingestion of estrogens, as estrogen is a functional castrating agent in the normal male and inhibits testicular production of androgen. This will have the effect of reducing muscular mass and initiating the development of breasts and other feminine characteristics. Hence, the hormonal balance is inappropriate as a determinant of sex due to its amenability to manipulation.

Genital Sex (Internal and External)

The internal and external genitalia factors are also inadequate as a medical standard of sex. The internal genitalia refer to the presence of the uterus or sperm ducts. Sexual identity is based upon the presence of one of these structures. By this criterion, the individual with a uterus would be a female, and the individual with sperm ducts would be a male. However, the internal organs in hermaphrodites are variable, with components of both the male and the female (often with female development on the side of the ovary and male development on the side of the testes)³⁰ making this test inapplicable to hermaphrodites.

For the transsexual who has undergone sex reassignment, this test is equally inapplicable, as the internal genitalia are removed as part of the surgery, and the criteria for judging sex is thereby eliminated.

29. This hormonal variation will produce gradual but significant changes in the secondary sex characteristics. See generally Hamburger, *Endocrine Treatment of Male and Female Transsexualism* in GREEN AND MONEY, at 291.

30. Money, *Sex Reassignment as Related to Hermaphroditism and Transsexualism* in GREEN & MONEY, at 99.

The external genitalia are the penis in the male and the labia and clitoris in the female. These are typically unfinished as male or female in hermaphrodites.³¹ These ambiguities have caused mistakes in sex designation of newborn children since sexual determination at birth is generally based upon a cursory examination of the external genitalia of the child by the attending physician or other person in attendance. The child's apparent sex is then recorded on the birth certificate.³² Although infrequent, there have been instances where doctors have been in error as to the sex of the child due to an ambiguous and misleading genital appearance.³³

The external genitalia is also an inappropriate standard for the postoperative transsexual, since these organs are removed in the sex reassignment process. Therefore, due to such anomalies as hermaphroditism and medically altered transsexuals, the internal and external genitalia diminish in significance as accurate determinants of sex.

Secondary Sexual Characteristics

The secondary sex characteristics: distribution of body hair, muscle mass, and presence of breasts, give an impression of sex. However, the phenotype (physical appearance) of an individual may not conform with the genetic configuration, as is the case with hermaphrodites.

The secondary sex characteristics for transsexuals are also amenable to manipulation by hormonal changes, an integral part of the sex reassignment process. Consequently, this factor is unreliable as a determinant of sex in both the hermaphrodite and transsexual.

Apparent Sex

Apparent sex enables the individual to be designated by the sex in which he has been raised, despite the presence of inconsistent

31. *Id.*

32. Many states have enacted statutes to deal with problems presented by a birth certificate inscribed with the wrong sex. See, e.g., N.D. CENT. CODE § 23-02-20 (1960); TENN. CODE ANN. § 53-419 (1966). See also Holloway, *supra* note 24, at 289, for a discussion of these "correction statutes."

33. See Kaufman v. Israel Zion Hospital, 132 Misc. 714, 51 N.Y.S.2d 412 (1944). There the doctor informed the parents that their child was a male and two days later informed the parents of his error. The parents sued for mental distress suffered because of misinformation. Recovery for mental distress was denied due to the absence of any accompanying physical injury. See Holloway, *supra* note 24, at 282, 286; Pauly, *Adult Manifestations of Male Transsexualism* in GREEN & MONEY, at 48.

organs. Dr. John Money of the Johns Hopkins Gender Identity Clinic in Baltimore, Maryland, has observed that when the external genitalia look normal and agree with assigned sex in hermaphrodites, sex reassignment is not ordinarily requested by the hermaphrodite, regardless of other hidden disparities of sex.³⁴ In other words, the role of rearing and sex assignment at birth has a significant impact on the establishment of a core gender identity in spite of disparate internal organs and chromosomal arrangement.³⁵

Notwithstanding the fact that the utilization of apparent sex as a standard ignores chromosomal composition, this test appears both flexible and adaptable enough to apply to the hermaphrodite. However, closer examination reveals that it is inapplicable to the transsexual. The sex of rearing is generally discordant with the clinical history of transsexuals, most of whom are raised in their anatomical sex role but nevertheless persist in an unalterable identification with the opposite sex from an early age.³⁶

The Psychological Test

In contrast, the psychological test is appealing because it humanely recognizes the sex that the individual has felt himself to be all along. This test initially appears applicable to the hermaphrodite as it entails a determination of sex on the basis of psychological orientation. However, sole use of the psychological test would exclude consideration of other, possibly discordant, sex factors. For example, the hermaphrodite may have the psychological orientation, hormonal balance, and physical appearance of a female, yet

34. Money, *Sex Reassignment as Related to Hermaphroditism and Transsexualism* in GREEN AND MONEY, at 113. Given two cases of female adrenogenitalism, appearing identical at birth, with one designated male and brought up as such, and the other female and consistently reared, the former will typically develop a male gender identity and the latter a female identity, dramatizing the profound influence environmental factors may have in determining the direction of gender identity and the significance of early gender-role orientation. Green, *Childhood Cross-Gender Identification* in GREEN & MONEY, at 23-24.

35. However, see 2 MED. J. AUST., *supra* note 1, at 251-52, which refers to contrary results in another study by Diamond in 40 QUARTERLY REV. BIOLOGY 147 (1965). Here children with sexual abnormalities were accidentally given the wrong sex at birth. It was found that in spite of rearing in the wrong sex, the children desired to change sex consistent with their genetic and hormonal designation. This request for change sometimes followed the spontaneous request of the child and sometimes was made with knowledge that the wrong sex had been assigned at birth. They were able to assume this new role without distress or difficulty, in opposition to the belief expressed at *supra* note 25, that sex reassignment beyond a certain age is improbable, if not impossible, where such a change is not requested by the individual.

36. Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 968 (1971). See also *supra* note 1.

have the gonadal and chromosomal designation of a male. Consequently, exclusive use of the psychological test to determine sex may provide a skewed and grossly inaccurate designation of "core" sex by ignoring other important factors which form the composite individual. These factors also demand attention and evaluation in reaching a final determination of sex.

Of crucial importance to a determination of sex is the *purpose* for which it is ascertained. It has been suggested that, for the limited purpose of facilitating a transsexual's adjustment in society, a psychological test be adopted for male transsexuals after sex reassignment surgery.³⁷

The psychological test, although practical for some purposes, is severely deficient for athletic purposes, as it considers none of the physical and hormonal differences between the sexes that affect athletic ability, specifically: musculature, skeletal mass, height, weight, heart and lung size.³⁸ Since these physical differences are indirectly reflected in the results of the chromosomal test, the latter test is a more appropriate determinant of sex in the sports milieu than the psychological test.

37. This viewpoint is in accord with that of legal scholars who have recommended the psychological test as being at once practical, realistic, and humane for the postoperative transsexual. Comment, *supra* note 36, at 970. However, such a test would be inapplicable to a transsexual prior to surgical reassignment since such an individual would have the physical attributes of a male while being psychologically female. It would be absurd to classify a preoperative male transsexual as a female. When there is no surgical intervention, legal sex must conform with anatomical sex, regardless of the transsexual's psychological orientation. See Stürup, *Legal Problems Related to Transsexualism and Sex Reassignment in Denmark* in GREEN & MONEY, at 453 where Stürup describes an interesting account of problems that occurred when a change of name for a female transsexual was granted prior to the sex change operation.

38. See *supra* note 15. Preliminary studies on rats support the assertion that the male body operates and responds to stimuli in a different manner than the female body. There is evidence that the male or female brain triggers hormonal secretion in different amounts, thus accounting for different behavior and activity levels in accordance with sex. Male rats showed higher aggression levels than the females. Further, if a male rat was castrated at weaning, his aggressive behavior was reduced, but *not quite* to the level seen in normal females. If these males received replacement treatment with testosterone, the males showed significant increases in aggressive behavior equivalent to that in a normal uncastrated male with the exception that there was a maintenance of other feminine behavior patterns in the castrated male.

Drawing a corollary to postoperative transsexuals, one must consider that there may be a subtle, but residual effect, of the male hormone testosterone on aggression levels, strength and other behavior in the surgically altered male to female transsexual. Levine, *supra* note 21, at 12-17.

The Chromosomal Test

The chromosomal test³⁹ indicates sex on the basis of chromosomal arrangement.⁴⁰ An XX chromosomal pattern indicates that the chromosomal composition of the individual is female, while the XY pattern indicates that the chromosomal composition of the individual is male. Generally, the phenotype (physical appearance) reflects this chromosomal arrangement.

The chromosomal testing procedure is relatively simple. A tissue scraping is taken from the buccal mucous membrane (the inner cheek cells) and then is microscopically examined for the presence of the X chromosome, or more specifically, the Barr body which is a chromatin mass found only in the nuclei of normal women. Each human cell contains 23 pairs of chromosomes, 22 of which are identical in the normal male and normal female. The 23rd pair, the sex chromosomes, differ in the male and female. In the female, this 23rd pair contains two like structures, the two X chromosomes. In the male, the 23rd pair are unlike, consisting of a larger X and a smaller Y chromosome. The second X in the female pattern is the Barr body. Upon staining the slide, the XX pattern becomes perceptible, producing a positive Barr body test.⁴¹ The Barr body test has been used by the Olympic Committee as a screening device for women's events since the 1968 Olympics.⁴²

If the Barr body test proves inconclusive, the examinee's karyotype, or chromosomal map, is examined.⁴³ For this test, a cell sample is grown for several days. Then a microscopic examination of the dividing cell reveals the precise chromosomal make-up. As a screening process, these chromosomal tests are scientifically accurate (the

39. The chromosomal test may also be called the Olympic test or Barr body test. However, these terms can be a source of confusion. The "chromosomal test" refers to a procedure that identifies chromosomal composition. Within the athletic milieu this procedure consists of two tests; the Barr body and karyotype tests which differ in precision. However, the term "chromosomal test" may also refer to the Barr body test alone, making it difficult to determine whether the composite chromosomal test or merely one part of the chromosomal test is the subject of discussion.

40. For a discussion of whether sex classification in accordance with the chromosomal test constitutes a violation of a transsexual's right to equal protection within the context of marriage and birth certificate changes, see Note, *Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test*, 15 SAN DIEGO L. REV. 331 (1978).

41. G. VALENTINE, *THE CHROMOSOME DISORDERS*, 12-14 (2d ed. 1969).

42. Affidavit of Daniel D. Federman at 2-4, *Richards v. U.S.T.A. Inc.*, 400 N.Y.S.2d 267 (1977) [hereinafter cited as *Federman Affidavit*].

43. Hay, *supra* note 15, at 998. See Games of the XXI Olympiad, Montreal 1976, International Olympic Committee Medical Controls, Rule 4.4.10 at 53.

karyotype test is 100% effective) and do not subject the competitor to either embarrassment or inconvenience.⁴⁴ In the Olympics, blood tests and a gynecological examination are made when an irregularity is apparent.⁴⁵

Although the Barr body test may be inconclusive when applied to those afflicted with various chromosomal disorders such as Klinefelter's Syndrome, Turner's Syndrome, or for those people classified as metafemale,⁴⁶ the back-up karyotype test will accurately identify these syndromes.

The chromosomal test may be inappropriate to classify (for general purposes) the sex of hermaphrodites and transsexuals who have the physical appearance of one sex but the chromosomal arrangement of the other. Sex designation at odds with physical appearance would impair rather than facilitate that individual's adjustment in society. Consequently, this test has gathered much criticism:

The "chromosomal sex" is merely of abstract, scientific, and theoretical interest in the case of transsexuals. Nobody can see an XX or XY constellation.

To insist that a person must live and be legally classified in accordance with his or her chromosomal sex violates common sense as well as humanity. It reduces science to a mere technicality and an absurd one at that. With the same justification, one may insist that Rembrandt's works are not his paintings, but pieces of canvas covered with paint. Accurate but asinine.⁴⁷

It must be noted that the opponents of the chromosomal test have not considered the express purpose behind its application to the athletic setting—to insure fairness. As previously stated, the appropriateness of a test of sex will vary with the purpose for which it is

44. Federman Affidavit at 7.

45. Games of the XXI Olympiad, Montreal 1976, International Olympic Committee Medical Controls, Rule 4.4.12 at 53.

46. See *supra* note 22.

47. Comment, *supra* note 36, at 969.

In lieu of the chromosomal test, another ascerbic critic has suggested: [Chromosomal arrangement notwithstanding] . . . females should be declared ineligible for sports competition "only when they exhibit advanced male characteristics; male external genitals and physique, unusual growth of hair on the face or who have levels of plasma testosterone similar to males.

Moore, *The Sexual Identity of Athletes*, 205 JAMA 787-7 (1968). Obviously the latter test would be ineffectual when applied to a chromosomal male with a genetic disorder that gives him a feminine appearance or for the "feminized" male-to-female transsexual who, having undergone electrolysis, breast implantation surgery, castration, penile amputation, and construction of an artificial vagina in the course of sex reassignment, appears in every regard to be a female.

employed. For example, the chromosomal test will be an inaccurate standard in determining the sex of a hermaphrodite or transsexual for purposes of marriage, change of legal documents, estate planning, criminal prosecution, etc.⁴⁸ However, the chromosomal test is more reasonable in the athletic milieu, as it fulfills an explicit and rational purpose.

There is a significant percentage difference in athletic performance between the male body and the female body.⁴⁹ Although the chromosomal or Barr body test does not screen relative muscular mass, skeletal proportion, and other physical characteristics that are unique to the sexes, it does establish the identity of the chromatin material that programs these differences. The chromosomal test is therefore desirable to determine sex in athletics as it identifies quantitative biological differences influential to sports performance. It is evident that any test used to determine sex for transsexuals in the sports milieu, which fails to consider biological differences, will erode the competitive aspect of sports by failing to screen out participants with an unfair competitive advantage.

Toward a Legal Definition of Sex

From a historical vantage, man has recognized but two distinct sexes, male and female, and has incorporated this perspective, albeit an archaic one, into our legal system. Consequently, there has been no legislation classifying the permutations of male and female which medical science has recognized.

As previously discussed, these anomalies raise serious questions as to the pertinent factors used to determine one's sex. The appropriate test is dependent upon the purpose for which the sex designation is being ascertained. As one writer astutely stated:

. . . it seems to follow that any attempt to define sex for legal purposes must take into account the specific purpose for which the classification is required, for it does not follow that what is a suitable criterion for one purpose will necessarily be suitable for another purpose.⁵⁰

For instance, a chromosomal test is inappropriate when applied to a postoperative male-to-female transsexual applying for a change of

48. Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236 (1975).

49. See *supra* note 15.

50. Bartholemew, *Hermaphrodites and the Law*, 2 MALAYA L. REV. 83, 97 (1960).

name from a male name to an obviously female name;⁵¹ but it would be appropriate as a condition to participation in athletic competitions due to anatomical differences between the sexes.

Courts have been reluctant to attempt a legal definition of sex to avoid opening the Pandoras Box such a consideration would entail. Certainly, the parameters of sex are both complex and confusing, as is evidenced by the skeletal knowledge presently available of the transsexual syndrome, only recently acknowledged and described by medical science.⁵² Nevertheless, society dictates that the Courts must keep abreast with the rapid strides of the medical profession and respond to such novel situations as may be presented.

Only a handful of courts have considered issues raised by male-to-female transsexuals. Although the majority have not explicitly formulated a legal definition of sex, one can infer from their decisions which indicium is controlling in determining legal sex. One such case, an English decision, *Corbett v. Corbett (otherwise Ashley)*⁵³ did formulate a legal definition of sex. Although without precedential value in our courts, the Corbett case has been influential in American jurisdictions considering similar issues.

The Genesis of a Legal Test—Corbett

The English case of *Corbett v Corbett*⁵⁴ considered the validity of a marriage between a male transsexual and her "normal"⁵⁵ male spouse. This required a determination of the true sex of the trans-

51. For a discussion of this problem in the preoperative and postoperative transsexual see *In the Matter of Anonymous*, 293 N.Y.S.2d 834, 837, 57 Misc. 2d 813, 815 (1968).

52. Although the phenomenon of transsexualism is centuries old, (see *supra* note 3) the research in the area of sex differentiation, including transsexualism, has principally been undertaken in the last fifteen years.

Dr. Harry Benjamin states in the preface to his book, *THE TRANSSEXUAL PHENOMENON*:

There is a challenge as well as a handicap in writing a book on the subject that is not yet covered in the medical literature. Transsexualism is such a subject . . . The handicap lies in the absence of all previous observations to which to compare one's own . . . The challenge lies in the novelty of these observations and in the attempt to describe clinical pictures and events without preconceived notions.

THE TRANSSEXUAL PHENOMENON, at vii.

53. [1970] 2 All E.R. 33.

54. *Id.*

55. "[Petitioner] also described his sexual deviations. From a comparatively early age, he had experienced a desire to dress up in female clothes . . . he had done so in the presence of his wife on a few occasions. Subsequently, he had dressed as a woman four or five times a year . . . and the urge to do so continued." *Id.* at 37. This passage describes the syndrome known as transvestism; the act of dressing in the clothing of the opposite sex. It is usually attributed to a psychological compulsion and is often practiced for the individual's general sexual stimulation or to assist in the achievement of orgasm. *GREEN & MONEY*, at 487.

sexual respondent since the court assumed that a valid legal marriage required persons of opposite sex.⁵⁶

The respondent, George Jamison, was a male-to-female transsexual posthumously named April Ashley. After working as a female impersonator in Paris, respondent's incessant desire to become a woman was finally realized. A sex-change operation was performed in which the testicles and parts of the scrotum were removed and an artificial vagina was created. Subsequently respondent lived as a woman and met petitioner, Arthur Corbett. Petitioner, married at the time, and subsequently divorced, became "mesmerized" with the respondent,⁵⁷ a condition which continued for the following three years until the parties were married. At that time the petitioner knew that April had been born and raised as a male and had undergone a sex change operation. Three months later the parties separated, having been together for no more than fourteen days since the marriage ceremony. Arthur Corbett filed a petition for a declaration that the marriage was null and void because the respondent was of the male sex, or alternatively for a decree of nullity on the ground of non-consummation. April answered, requesting a decree of nullity on the basis of either the petitioner's incapacity or willful refusal to consummate the marriage.

In an exhaustive and fascinating opinion, Judge Ormrod, a medical doctor as well as a judge,⁵⁸ gathered a considerable wealth of expert medical evidence on transsexualism.⁵⁹ Judge Ormrod determined that since marriage is essentially a relationship between a man and a woman, the validity of the marriage depended on whether the respondent was or was not a woman. The court then considered what was meant by the word "woman" in the context of a marriage.⁶⁰

Judge Ormrod determined that:

. . . The Respondent has been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have testicles

56. *Corbett v. Corbett*, [1970] 2 All E.R. at 48f. For a discussion of marriage between members of the same sex see comment, *Same Sex Marriage and the Constitution*, 6 U. CAL. D. L. REV. 275 (1973).

57. *Corbett v. Corbett*, [1970] 2 All E.R. at 37j.

58. Judge Ormrod is a highly esteemed physician in the specialty of forensic medicine. 3 ARCHIVES OF SEXUAL BEH. 33, 47 (1974).

59. "An unusually large number of doctors gave evidence in the case, amounting to no less than nine in all, including two medical inspectors to the Court . . . The quality of the medical evidence on both sides was quite outstanding, not only in the lucidity of its exposition, but also in its' intellectual and scientific objectivity . . . *Corbett*, *supra* note 57, at 35e-g.

60. *Id.* at 48f.

prior to the operation and therefore, to be of male gonadal sex; to have had male external genitalia without any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and psychologically to be a transsexual . . . Socially, by which I mean the Respondent is living in the community, she is living as and passing as, a woman more or less successfully. Her outward appearance, at first sight, was convincingly feminine, but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitude became increasingly reminiscent of the accomplished female impersonator. The evidence of the medical inspectors and of the medical doctors who had an opportunity during the trial of examining the respondent clinically, is that the body, in its post-operative condition, looks more like a female than a male as a result of very skillful surgery. Professor Dewhurst, after his examination, put his opinion in these words—'the pastiche of femininity was convincing'. That, in my judgment is an accurate description of the respondent. It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. . . .⁶¹

Having regard to the essential heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological . . . In other words, the law should adopt, in the first place the first three of the doctors' criteria,⁶² . . . i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purposes of marriage accordingly.⁶³

The judge concluded that sex is determined at or before birth and that April must be designated as male, for marriage depends on sex, not on gender.⁶⁴ He stated that April continued to be a male and

61. *Id.* at 46-47.

62. The criteria of sex enumerated by the Corbett court are as follows:

- (i) Chromosomal factors
- (ii) Gonadal factors
- (iii) Genital factors (including internal sex organs)
- (iv) Psychological factors
- (v) Hormonal factors and secondary sex characteristics

Id. at 44.

63. *Id.* at 48h.

64. *Id.* at 49d. *See supra* note 2.

could not perform the "essential role of a woman in marriage."⁶⁵ Accordingly, the marriage was deemed void *ab initio*.⁶⁶

American Cases

In *Anonymous v. Weiner*,⁶⁷ a New York court took an analogous approach to that used in *Corbett*. A postoperative male-to-female transsexual applied to the New York City Bureau of Vital Statistics (a division of the New York City Health Department) for a change in sex designation on her birth certificate, seeking issuance of a new birth certificate rather than amendment of the original certificate.⁶⁸ The pertinent city ordinance permitted the issuance of a new birth certificate when the evidence showed "that an error was made at the time of preparing and filing of the certificate."⁶⁹ The Board of Health elected to resolve the issue by consulting the New York Academy of Medicine to determine if an error had indeed been made. An august body of specialists was gathered including gynecologists, endocrinologists, cytogeneticists, psychiatrists, and a lawyer. The Committee concluded that:

65. *Id.* at 48h. For a critical examination of the meaning of the ambiguous phrase "the essential role of a woman in marriage," within the context of family law, see 56 CORNELL L. REV., at 1006; 7 CONN. L. REV., at 318. Such an analysis is beyond the scope of this note.

66. The *Corbett* decision has been extensively criticized for its harsh and inflexible attitude towards transsexuals, particularly in its prospective application to issues other than the right to marry. See 56 CORNELL L. REV., at 1006; 7 CONN. L. REV., at 316-22; 31 MD. L. REV., at 244-47; Kennedy, *Transsexualism and Single-Sex Marriage*, 2 ANGLO-AM. L. REV. 112 (1973). For a discussion of a distinction made by Judge Ormrod in *Corbett* in regards to a previous case see Comment, *Sex and Gender*, 1 LANCET 405, 406 (1970). In that case a woman had a genital defect making intercourse difficult if not impossible, precluding an "essential role of a woman in marriage". It was held that the marriage was *not* null and void if an artificial vagina could be surgically constructed. However, Judge Ormrod indicated that he would differentiate between enlargement of an existing but defective vagina (relying upon the precedent of the earlier case of *S. Y. v. S. Y.*) and the construction of an entirely artificial vagina (which occurs in the sex reassignment procedure for male transsexuals).

The distinction between sex and gender drawn by Judge Ormrod is particularly relevant to the issues presented by transsexuals desiring to compete in athletics, as athletic performance, too, depends on sex, not gender. A postoperative transsexual participant will compete with the advantages afforded by physical characteristics associated with sex, not with psychological orientation and anatomical physique which merely simulates the newly adopted sex, and is more properly equated with gender orientation. Consequently, the chromosomal, gonadal and genital tests of sex, mandated in the *Corbett* decision as standards of sex appropriate in the marital context are equally appropriate to the athletic milieu as standards to be satisfied in determining legal sex for athletic competition.

67. 270 N.Y.S.2d 319, 50 Misc. 2d 380 (1966).

68. The normal method of changing birth certificates by the New York Bureau of Vital Statistics was by amendment, where a line is drawn through the information subject to amendment and the correct information is written above it. *Id.* at 323, 50 Misc. 2d at 383.

69. *Id.*

1) Male-to-female transsexuals are still chromosomally males while ostensibly females.

2) It is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.

The committee is therefore opposed to a change of sex on birth certificates for transsexualism.

. . . The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud.⁷⁰

In accordance with the decision of the New York Academy of Medicine, the agency denied petitioner's application for the issuance of a new birth certificate, stating that, "Sex can be changed where there is an error . . . but not where there is a later attempt to change psychological orientation of the patient and including such surgery as goes with it."⁷¹

Petitioner persevered, seeking a writ of mandamus to compel the change and the issuance of a new birth certificate under Article 78 of the New York Practice Law and Rules. There the court was confined to the issue of whether the Board of Health acted in an "arbitrary, capricious or otherwise illegal manner"⁷² in reaching their decision. Predictably, the court deferred to the decision rendered by the Board of Health, concluding that no basis existed for the relief requested, thereby tacitly adopting the chromosomal test of sex.

The holding in *Weiner* was the topic of reproach in a subsequent New York case, *In the Matter of Anonymous*.⁷³ There, the lower court lacked the jurisdiction to order a birth certificate change since the action required a writ of mandamus but considered the issues implicit in a request for a change of name. In an eloquent and compassionate opinion, Judge Pecora disagreed with the conclusions of the *Weiner* court, stating:

A male transsexual who submits to a sex-reassignment [operation] is anatomically a female in fact. This individual dresses, acts and comports himself as a member of the opposite sex

70. *Id.* at 322, 50 Misc. 2d at 382. The panel from the New York Academy of Medicine has published its report on which the Board of Health based its decision. See Report, *Change of Sex on Birth Certificates for Transsexuals*, 42 BULL. N.Y. ACAD. MED. 721, 723-24 (1966).

71. 270 N.Y.S.2d at 322, 50 Misc. 2d at 382.

72. *Id.* at 323, 50 Misc. 2d at 383.

73. 293 N.Y.S.2d 834, 57 Misc. 2d 813 (1968).

. . . It would seem to this Court that the possibility of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to classify this individual as a "male" when, in fact, as aforesaid, the individual comports himself as a 'female'.⁷⁴

Furthermore, Judge Pecora proposed a more humane formula for sexual status than the Weiner court, advocating a psychological rather than a chromosomal test for changes of a statistical nature. He stated:

Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and if such conformity requires changes of a statistical nature, then such changes should be made.⁷⁵

Such an enlightened and sensitive approach to the difficulties faced by postoperative transsexuals is characteristic of a more liberal attitude towards transsexualism, but this holding is expressly limited to the grant of an application for a name change. In granting a male-to-female transsexual a change of name, a New York court later stated:⁷⁶

Therefore, the application is granted. However, the order to be entered thereon will provide that the order shall not be used or relied upon by Petitioner as any evidence or judicial determination that the sex of Petitioner has in fact been changed.⁷⁷

Consistent with this opinion is *Matter of Hartin v. Director of Bureau of Records*,⁷⁸ where the court upheld a Board of Health decision granting a change of name on a birth certificate while omitting any designation of sex on the certificate. The court noted the Board of Health's opinion that radical surgery on transsexuals is done to alleviate the patients' mental condition, but that it does not change the body cells governing sexuality,⁷⁹ i.e., the chromosomes.

Concurrent with the more permissive approach with respect to

74. *Id.* at 835, 57 Misc. 2d at 814.

75. *Id.* at 837, 57 Misc. 2d at 816.

76. *In re Anonymous*, 314 N.Y.S.2d 668, 64 Misc. 2d 309 (1970).

77. *Id.* at 670, 64 Misc. 2d at 311.

78. 347 N.Y.S.2d 515, 75 Misc. 2d 228 (1973).

79. *Id.* at 517-18, 75 Misc. 2d at 230-31.

transsexualism is the New Jersey case of *M.T. v. J.T.*⁸⁰ The wife, a male-to-female transsexual, filed a complaint for support and maintenance. The husband interposed the defense that the wife was a male and their marriage was void. Unexpectedly, the court departed from the traditional *Corbett* rationale and held that the plaintiff should be considered a member of the female sex for the limited purpose of marriage. The court declared that, ". . . if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."⁸¹ The court went on to conclude:

Consequently Plaintiff should be considered a member of the female sex for marital purposes. Such a recognition based upon medical judgment and irreversible action will promote the individual's quest for inner peace and happiness, while in no way dis-serving any societal interest, principle of public order or precept of morality.⁸²

However, the New Jersey court noted the limited practicality and scope of the psychological and anatomical (phenotype) test:

The evidence before this Court teaches that there are several criteria or standards which may be relevant in determining the sex of an individual is unquestionably significant and probably in most instances indispensable. For example, sex classification of an individual at birth may as a practical matter rely upon this test. For other purposes, however, where sex differentiation is required or accepted, such as for . . . services in the branches of the armed forces, *participation in certain regulated sports activities*, eligibility for types of employment and the like, other tests in addition to genitalia may also be important.⁸³

Foreign Cases

Foreign jurisdictions have approached the issue of a transsexual's legal sex with a comparatively conservative tone.

The Argentinian case of *Ricardo San Martin*,⁸⁴ in which a doctor was prosecuted for performing a sex change operation, adopted a

80. 140 N.J. Super. 77, 355 A.2d 204 (1976).

81. *Id.* at 87, 355 A.2d at 212.

82. *Id.* at 90, 355 A.2d at 214.

83. *Id.* at 86, 355 A.2d at 211. (emphasis added).

84. 123 La Ley 605 (C.N. Crim. y. Correc. Argen. 1966) (discussed in English in Strauss, *Transsexualism and the Law*, 3 COMP. & INTL. L.J. S. AFR. 348, 351-53 (1970)). See also Comment, *supra* note 14, at 979-81.

chromosomal criterion for sex determination: "He was a man and would continue to be so until the day he dies. No female chromatin bodies were found in his cellular nuclei."⁸⁵ In addition, the court suggested that legal sex is determined by the ability to procreate:

Mankind would subsist although every man in this world were to have his arms cut off, were to lose his property, his honor and his fatherland . . . The action of the accused absolutely defies all that nature imposes. He knew that he could not change a man into a woman; he attempted to simulate this. However far medicine advances, it can never violate the secrets of creation—procreation and death.⁸⁶

A West German case⁸⁷ involving a postoperative male-to-female transsexual seeking a change of birth certificate (to avoid possible prosecution for homosexuality) held that the court did not have the competence to order an alteration of the birth certificate which correctly reflected the sex of the applicant at the time of birth. The applicant did not make out a case justifying an alteration of the birth certificate:

Although . . . there is the theoretical possibility that hormone and genetic factors may be involved in the causation of such a situation, they are not yet identifiable according to scientific knowledge presently available . . . As long as the science of medicine does not provide a generally acceptable explanation of the origin and the conditions for development of transvestism [transsexualism] a person of the said kind cannot be classified legally to the opposite sex after an operation had changed his appearance.⁸⁸

The thrust of this decision is that the West German court refused to adopt a psychological approach to sex. Instead, it took the position that the sex change operation merely achieves a simulation of the opposite sex, and that sex should be determined by the immutable chromosomal arrangement and the phenotype manifested at birth.

The East German courts are aligned with those of West Germany in their rejection of the psychological test of sex to classify transsexuals. The Hamburg journal *Polizei* carried an article on

85. Strauss, *supra* note 84, at 352.

86. *Id.*

87. 22 Neue Juristische Wochenschrift 1476-1577 (Oberlandesgericht, Frankfurt, West Germany 1969) (discussed in English in Note, *Sex Change Operations and the Law*, 87 S. Afr. L.J. 239-40, Strauss, *supra* note 84, at 358 (1970) and; Meyers, *Problems of Sex Determination and Alteration*, 36 MEDICO-LEGAL J. 174, 180 (1968)).

88. Note, *supra* note 87, at 174-90.

Rechtsprobleme der Intersexualität.⁸⁹ This article discussed the decision of a Berlin court which denied a postoperative transsexual a change of sex status for the purpose of altering a passport. The court was of the opinion that the basic legal criterion for sex determination was the individual's natural physical condition at the time of his birth rather than subsequent physical changes that might occur in the individual due to a mixture of behavior patterns, medication, or operative procedures.⁹⁰

Scotland, in conformity with the English *Corbett* case, refused to adopt the psychological test of sex as determinative of a postoperative transsexual's legal sex. In an unreported case,⁹¹ where a postoperative transsexual sought a change of birth certificate, the Scottish court determined that it was unable to amend the entry of the individual's birth since the statute at issue dealt with the correction of errors made at the date of entry, not made wrong due to subsequent changes. The court held that:

Skin and blood tests still show X's basic sex to be male and that the changes have not yet reached the deepest level of sex determination. It seems to me accordingly that while X could be described as an abnormal male, it would not be possible to describe him as a female. I do not think that the Register can be corrected because of some subsequent change of circumstances. The Register is essentially a record of fact at a fixed time: it is not, and is not intended to be, a narrative of events.⁹²

South African courts have taken a more progressive approach to transsexuals than the nations previously discussed. One writer⁹³ has indicated that South Africa permits alterations of birth certificates after surgical intervention and marriage, indicating that the psychological approach to sex has been adopted for the limited purpose of marriage and statistical change.

Switzerland has also adopted the psychological test of sex for a postoperative transsexual, as described in the Swiss journal *Schweizerische Medizinische Wochenschrift*.⁹⁴ In this case, the sub-

89. 1967 (July-Aug.) *Excerpta Criminologica* (s 1099) (discussed in Meyers, *supra* note 87, at 174-90).

90. *Id.*

91. No. 35 Scots Law Times 61 (Sept. 28, 1957).

92. *Id.*

93. Note, *supra* note 87, at 239.

94. This article appearing in 1963 was entitled *Change of Sex by Surgical Operation and Subsequent Legal Recognition of the Female Status of a Transvestite*. 1963 (*Excerpta Criminologica*) 430 (in Meyers, *supra* note 87, at 174).

ject was married and the father of one son. Subsequent to his self-mutilation (presumably self-castration, which is common to transsexuals who cannot obtain proper treatment),⁹⁵ operative castration was carried out. After obtaining a divorce, the patient succeeded in having his genitals operatively transformed to the female sex (i.e., creating an artificial vagina by inlay grafting and plastic surgery).⁹⁶ As a result, the patient was able to have her newly-acquired female status sanctioned by a court of law.

As early as 1945 a Swiss court had examined the issue of a transsexual's legal sex and concluded that psychological sex had to be accepted as the legal standard when accompanied by surgical reassignment:⁹⁷ "Now that the patient's psychic association with the female sex is strongly supported by anatomical changes it appears to us impossible to go back. It would therefore be advisable to recognize legally a state which the law did not prevent from coming into existence."⁹⁸

The court reasoned that:

This aversion (to male clothing, genitalia, etc.) may even lead to self-mutilation . . . or to castration . . . It is clear that it is not an ordinary vice which can lead to such extremes and that the subject must be driven to them by inner forces beyond his control.

This inclines us to attribute to the psychic element, in the determination of sex, an importance at least equal to that of the physical element . . . In granting him the civic status of a woman we are satisfying the most profound desire to his well-being while consolidating his psychic and moral equilibrium; at the same time we are facilitating his social adaptation by permitting him to lead a more normal type of life than heretofore. The personal interest which urges him to ask for a change of civic status is thus not opposed to the interests of public order and morality—quite the contrary.⁹⁹

It seems apparent that foreign jurisdictions have responded in a similar vein as American courts to the legal issues raised by transsexuals. With the exception of Switzerland, which legally recognizes the new sex of a postoperative transsexual for all purposes, other

95. See *supra* note 1.

96. See *supra* note 26.

97. In re Leber (Neuchatel Cantonal Ct., July 2, 1945) (decision reprinted in full in E. DE SAVITSCH, *HOMOSEXUALITY, TRANVESTISM AND CHANGE OF SEX*, 96-107 (1958). Also discussed in Comment, *supra* note 14, at 971-72).

98. E. DE SAVITSCH, *supra* note 97, at 100.

99. *Id.* at 104-05.

countries have failed to reclassify the legal sex of a transsexual to conform with the new appearance. Despite the fact that exceptions are made for changes of a statistical nature, or for marriage, the majority of foreign decisions discussed are still guided by the immutable chromosomal composition to determine the legal sex of a transsexual.

The Liberal Trend

It is indeed encouraging to see the emergence of a sympathetic attitude towards transsexuals in our courts. This is exemplified by the liberalization of the legal requirements for social ascriptions such as name change, change of legal identity on official records, the right to marry, etc., all of which have a negligible effect on society at large. Additionally, several states have allowed transsexuals to receive Medicaid benefits for their sex-change operations. For example, in the recent cases of *Doe v. Lackner*¹⁰⁰ and *G.B. v. Lackner*¹⁰¹ the California Court of Appeal overruled the State Department of Health and declared that all medical services involved in transsexual surgery were payable under the state Medi-Cal program. The state had refused to pay for the surgery claiming that these operations were merely "cosmetic" and therefore not covered under the Medi-Cal program. However, in ruling on the evidence, the appellate court found that the surgery was both necessary and reasonable. The court stated that transsexualism is an illness and the sex change procedure was the only effective means to treat that illness.¹⁰² In granting the Medi-Cal benefits the court said: "We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic."¹⁰³

Following this liberal trend, Minnesota¹⁰⁴ and Georgia¹⁰⁵ have also

100. *Doe v. Lackner*, 1 Civ. 42125 (Cal. Ct. App., 1st Dist., 3d Div. filed Apr. 20, 1978).

101. *G.B. v. Lackner*, 1 Civ. 41363 (Cal. Ct. App., 1st Dist., 3d Div. filed Apr. 20, 1978).

102. *Doe v. Lackner*, *supra* note 100, at 6; *G.B. v. Lackner*, *supra* note 101, at 10.

103. *Doe v. Lackner*, *supra* note 100, at 6 (paraphrasing *G.B. v. Lackner*, *supra* note 101, at 10). In response to these two cases S.B. 2200 was introduced in the California Legislature by Senator Paul Carpenter and Senator Campbell as part of the WELF. & INST. CODE to read: "§ 14137(1) No payment shall be made under this chapter for the costs of cosmetic surgery, including sex change operations." S.B. 2200 (1978).

104. The Minnesota Supreme Court in *Doe v. Minn. Dep't. of Pub. Welf.*, 257 N.W.2d 816 (1977) held that the total exclusion of transsexual surgery from eligibility for medical assistance was void for several reasons: First, absolute exclusion of coverage for transsexual surgery contravenes federal regulations against arbitrary denial of funds to an eligible individual solely because of diagnosis, illness or condition. Second, coverage was improperly denied because medical necessity was equated with a guarantee of surgical success. Third, the standard adopted by the state Welfare Department associated the requirement of medical

ruled that sex reassignment surgery is within the scope of state medical assistance benefits for those who have or intend to undergo a sex-change operation.

Furthermore, a number of states¹⁰⁶ have enacted statutes permitting the postoperative transsexual to obtain a new, rather than amended birth certificate. California has recently adopted Health and Safety Code Statutes §§ 10475-10479 authorizing revision of birth certificates to reflect surgically accomplished changes of sex.¹⁰⁷ It reads in pertinent part:

§ 10475—Revision of Birth Records to Reflect Change of Sex

Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for such person reflecting the change of gender and any change of name accomplished by an order of a court of this state . . . A petition for the issuance of a new birth certificate in such

necessity with the removal of an applicants name from the welfare rolls, a requirement the court found "ludicrous". *Id.* at 821. Accordingly, the case was remanded to the District Court with instructions to order the Department to grant the Appellant medical assistance benefits to finance the surgery.

105. In *Rush v. Parham*, 440 F.Supp. 383 (N.D. Ga. 1977), the Georgia court granted summary judgment for plaintiff in a suit challenging the Georgia Department of Medicaid Services' denial of an application for Medicaid reimbursement for sex reassignment surgery expenses. The court held that the requested surgery for a true transsexual is medically necessary (when certified by the attending physician in consultation with the patient) and, as such, may not be considered optional or discretionary under the Georgia Medicaid program. The court enjoined the defendant State from applying the departmental exclusion for coverage of sex reassignment surgery and ordered it to approve plaintiff's application for Medicaid reimbursement.

Two New York cases concerning transsexual surgery have not held that the state is bound by the opinion of the attending physician as to the medical necessity of the surgery. *Denise R. v. Lavine*, 383 N.Y.S.2d 568, 347 N.E.2d 893 (1976); *In re Vickers v. Toia* (N.Y. Sup. Ct., May 1977) (in 1977 MEDICAID AND MEDICARE GUIDE, New Developments, (CCH) § 28,507). In *Denise R.* the court held that the state was not required to pay for transsexual surgery where a conflict existed as to medical necessity. The court reached this result notwithstanding testimony from the treating physician that the surgery was a life or death matter. In *Vickers* the court held that the determination of the state agency denying medicaid benefits was not arbitrary, unreasonable or capricious since the evidence offered by the applicant's psychiatrist fell short of the "matter of life or death" testimony offered in *Denise R.* Since the application in *Denise R.* was denied in the face of such testimony, the application in *Vickers* with a lesser showing of necessity was also denied.

106. See ILL. ANN. STAT. ch. 111 ½, §73-17(d) (Smith-Hurd Supp. 1967). (New Certificate of Birth), LA. REV. STAT. ANN. § 40:61 (West 1969). (Issuance of New Birth Certificate after Anatomical Change of Sex by Surgery); ARIZ. REV. STAT. § 36-326(4). (New Certificates of birth following . . . surgical alterations).

107. CAL. HEALTH & SAFETY CODE § 10475 (West 1977) (emphasis added).

cases shall be filed with the superior court of the county where the petitioner resides.¹⁰⁸

Such legislative and judicial assistance facilitating the transsexual's metamorphosis to a new sexual role reflects the sensitive attitude of the legal profession to this unique syndrome, while simultaneously chiseling at the precedential value of previous cases.

Although some courts have shown a marked reluctance to issue new birth certificates, others have responded with alacrity to the legal needs of transsexuals, applying the psychological/phenotype test to permit birth certificate changes, marriage, support and maintenance, and state medical assistance benefits for sex reassignment procedures. The legislatures have also been active, passing statutes that permit a postoperative transsexual to obtain either a changed or new birth certificate with a minimum of difficulty. Indeed, denial of such requests would, in effect, constitute punishment for those individuals who had finally received relief from an intolerable sexual role by attaining a state the law did not prevent from coming into existence.

These cases had been consistent in their view that the sex reassignment procedure does not and cannot change the essential sex of an individual. Until *Richards*, the courts had limited their holdings to a grant of such peripheral relief as was requested within the context of the marital relationship or petitions for statistical changes. However, they had exercised restraint by their recognition of the fact that physical appearance would change, but the essence of sex was not changed by the sex reassignment procedure.

The decision in *Richards v. U.S.T.A.* was an inconsistent departure from this trend. It not only held that a postoperative transsexual had actually changed sex in accordance with the psychological/phenotype test, but the test was formulated within a context where other persons' rights would be directly affected by that reclassification. As previously stated, it does not follow that the standard which is suitable to define legal sex for one purpose will necessarily be suitable to define sex for another dissimilar purpose.

The Olympic Test of Sex

In response to differential abilities and sports performance ratios between the sexes,¹⁰⁹ segregation of athletic contests by sex has been

108. *Id.*

109. Such differentiation is common and finds its expression in such sports as tennis and golf on both the amateur and professional levels. *See also supra* note 16.

both a desirable and necessary goal. On an international level, the Olympic Committee segregates sports by sex, with the exception that men and women compete together in Olympic yachting, equestrian and shooting events.¹¹⁰ The rationale espoused by the United States Olympic Committee for separation of the sexes in the majority of events, is that it insures the matching of persons of equal strength.¹¹¹

For many years the International Olympic Committee has found it necessary to discriminate between the sexes on a nonphenotypic basis to prevent the introduction of inequality and unfairness into athletic contests. This was precipitated by deliberate attempts on the part of nations to enter imposters into women's events and by innocent competitors with chromosomal disorders (unknown to them) which blurred the distinction between the sexes.¹¹² The phenotype test of sex (observation of primary and secondary sexual characteristics) was not used by the International Olympic Committee to classify the sex of participants, due to its unreliability (physical appearance is not an immutable characteristic, being subject to alteration by the ingestion of hormones). Furthermore, this test was inapplicable to those individuals with the organs of both sexes—hermaphrodites, or those individuals with other chromosomal abnormalities. Also, the phenotype test was objectionable as a screening device because of the possibly offensive and alienating effect an intimate physical exam would have on potential competitors.¹¹³

The psychological test of sex was not a useful standard for the International Olympic Committee because it is necessarily subjective, and therefore difficult and time-consuming to administer on an international level. Furthermore, it was held that despite the fact that anatomy in the postoperative transsexual would conform to psychological self-image, this test was inadequate to designate sex where the participant intended to compete against others on the basis of physical ability. Lastly, a letter from the competitor's doc-

110. *Experts Say Competitive Advantage Holds for MD Tennis Star Despite Sex Change*, Medical Tribune, Sept. 22, 1976.

111. *Id.*

112. U.S.T.A., Statement on Sex Determination at U.S. Open Tennis Championships (Aug. 25, 1976), *Richards v. U.S.T.A.*, 400 N.Y.S.2d 267 (1977) (Exhibit B). See also Hay, *supra* note 15, at 998.

113. Affidavit of George W. Gowen at 11, *Richards v. U.S.T.A.*, 400 N.Y.S.2d 267 (1977). [hereinafter cited as Gowen Affidavit].

tor attesting to the sex of a "female" athlete was not deemed reliable because the possibility of fraud was too great.¹¹⁴

Consequently, the chromosomal test (Barr body and karyotype test)¹¹⁵ was adopted by the International Olympic Committee as a legitimate, efficient and justifiable screening requirement for participants in International events.¹¹⁶ In pertinent part the International Olympic Regulations for Femininity Control provide:

4.4.9 As a screening test, the determination of X-chromatin will be conducted on a smear of buccal mucous membrane.

4.4.10 If the test is inconclusive, the competitor must undergo further tests as determined by the IOC Medical Commission (karyotyping).

4.4.12 Should the results of these tests require it . . . a physical examination can be prescribed and performed by a physician gynecologist . . .

4.4.13 The Medical Commission will issue a femininity certificate to those competitors whose test results are conclusive.¹¹⁷

Although the chromosomal test does not measure such characteristics as muscle-to-tissue ratio, skeletal size, etc., it does accurately identify the genetic sex of the individual and hence predicts the presence of certain physical characteristics that distinguish and are unique to a particular sex. For example, in a normal male the chromosomal test would reveal an XY chromosomal arrangement. From this one would infer that the individual had a male skeletal structure, male hormonal balance, male muscular configuration, male

114. U.S.T.A. statement, *supra* note 112 and, *The Second Time Around for Renee*, New York Times, Apr. 16, 1977, Sports at 19, col. 1.

115. See notes 39-46 & accompanying text *supra*.

116. The chromosomal test of sex was "first" administered for international competition at the time of the 1966 European Track and Field Championships. In the 1968 Olympic Summer Games and Olympic Winter Games, selected athletes from each of the women's individual sports teams were chosen to undergo the test. Now all women competitors participating in Olympic women's sporting events must undergo this chromosome test. Letter to author from the United States Olympic Committee (Sept. 12, 1977).

In addition to the International Olympic Committee other sports federations, have adopted the Olympic test for sex; such as the Rome Open (tennis). *Renee Richards Fails Sex Test for Rome Open*, N.Y. Times, May 15, 1977, Sports at 8, col. 4. The Paris Open (tennis) has also adopted the chromosome test as a condition to participation in that tournament. *4 Set Victory For Solomon in France*, N.Y. Times, May 25, 1977, Sports at 22, col. 3.

117. Games of the XXI Olympiad, Montreal 1976, International Olympic Committee Medical Controls, Rules 4.4.9-4.4.13 at 53.

Rule 4.4.1 provides: "The result of this examination (femininity control) will not be made public out of deference to the human rights of the individual."

Under Rule 4.4.7: a valid certificate of femininity issued by the IOC Medical Commission or International Federation during World Championships or Continental Championships will be dispositive of the question of a competitor's femininity.

anatomical structure, and other attendant features associated with a male phenotype.

In the case of a male-to-female transsexual, the chromosomal test would indicate that despite the feminine appearance or psychological orientation of the individual, the genotype is male and the attendant features have the properties of the male sex (however, these are subject to dilution by the ingestion of hormones). Proponents of the chromosomal test as a legal determinant of sex for sports claim that the transsexual who has competed in athletic events as a male will have a competitive and training advantage over many women who have played only as women.¹¹⁸ Although the muscular development of a male will be affected by transsexual surgery and the ingestion of estrogens,¹¹⁹ some experts contend that the degree of muscular development or atrophy is only partial and will depend on the age of the male at the time of the surgery and the intensity of the hormone treatment.¹²⁰ Furthermore, neither removal of the testes, nor any subsequent treatment with estrogen can affect the individual's achieved height or skeletal structure.¹²¹ Thus, a negative chromosomal test in a transsexual (denoting the presence of the Y or male chromosome) may indicate certain immutable and residual physical characteristics associated with the male sex which would bestow that phenotypic female with the competitive advantage of male size and musculature. Consequently, proponents find the Olympic test of sex desirable as it classifies the male-to-female transsexual as a male, regardless of psychological orientation or physical appearance.

However, experts differ on the subject. Opponents of the chromosomal test contend that, when applied to transsexuals, the chromosomal test indicates only that the genetic constellation of the individual is male and does not reflect residual traces of masculinity as none exist. They feel that sex reassignment surgery and its compan-

118. See *Experts Say Competitive Advantage Holds for MD Tennis Star Despite Sex Change*, Medical Tribune, Sept. 22, 1976; U.S.T.A. Position on Transsexuals (March 25, 1977), *Richards v. U.S.T.A.* 400 N.Y.S.2d 267 (1977) (Exhibit 12).

119. Removal of the testes, the main source of androgen (male hormones) significantly decreases the male hormones in the blood and results in a decreased muscle mass. Additionally, the transsexual is taking estrogens to develop feminine characteristics which will alter muscle configuration even further. See generally, Hamburger, *Endocrine Treatment of Male and Female Transsexualism*, in GREEN & MONEY, at 291-304.

120. Federman Affidavit at 5. Dr. Daniel Federman is a professor and Chairman of the Department of Medicine at the Stanford University School of Medicine.

121. Memorandum of Points and Authorities for Defendant U.S.T.A. at 32; Memorandum of Points and Authorities for Defendant W.T.A. at 7-8.

ion endocrinological treatments produce a genuine panacea—an individual with a decreased muscular mass, height, weight, and physique well within the female norm.¹²² They contend that despite the negative chromosomal test, the transsexual has the appearance of a woman having had a hysterectomy and ovariectomy (i.e., pan-hysterectomy) and the external genital appearance, gonadal identity, endocrinological makeup, and psychological and social development of a female. Therefore, they argue that the chromosomal test is inappropriate when applied to classify the sex of a transsexual, for it bears no reasonable relationship to any physical characteristics associated with the residual genotype, now sequestered from any attributes of masculinity. Indeed, to classify this individual as a male when anatomically and psychologically the person appears to be female, is incongruous for most social situations.¹²³ It has been argued that sex is a composite of factors which must be considered in toto to determine the sex of a transsexual, rather than allowing one factor, the chromosomes, to be dispositive of a very delicate and critical issue—despite this test's apparent utility within the athletic milieu.

It is apparent from these alternative viewpoints that the chromosomal test of sex, as employed by the International Olympic Committee is not indefectible, attracting legitimate controversy and debate. This is an area of first impression in both the medical and legal fields. Nevertheless, whatever test is eventually dispositive of the sexual status of a transsexual for athletic purposes, it should emulate, not emasculate the general moral and ethical objective that is the foundation of the Olympics: that sport should involve the matching of skill and strength based upon the natural capabilities of participants.¹²⁴ While an individual's right to live his or her life and do as he/she may choose must be honored and respected, such

122. Affidavit of Roberto Granato at 1-2. [hereinafter cited as Granato Affidavit]. (Dr. Granato is a physician and surgeon licensed to practice in the state of New York and is the doctor who performed the sex change operation on plaintiff Renee Richards.) Affidavit of John Money at 4-5. [hereinafter cited as Money Affidavit]. (Dr. Money is a psychologist, presently serving as a professor and practitioner at Johns Hopkins Medical School in Baltimore, Maryland.) Affidavit of Dr. Leo Wollman at 2. [hereinafter cited as Wollman Affidavit]. (Dr. Wollman is an acknowledged authority in the field of transsexualism, currently in private practice in the state of New York. He has had extensive experience treating transsexuals, having personally treated over 1700 transsexual patients. Dr. Wollman was an expert witness in *In re Anonymous*, *supra* note 73. See also Moore, *supra* note 18, at 163.

123. See *In re Anonymous*, *supra* note 73 at 835.

124. Games of the XXI Olympiad, Montreal 1976, International Olympic Committee Medical Controls at 15.

rights should not be allowed to contravene the basic maxims of competitive athletics.

Richards v. United States Tennis Association

Introduction

In *Richards*, the court was required to determine the relative superiority of the Olympic test as opposed to the psychological test as dispositive of the sex of a transsexual for athletic purposes. The United States Tennis Association (U.S.T.A.), United States Open Committee¹²⁵ (U.S.O.C.), and Women's Tennis Association (W.T.A.) had adopted the chromosomal test as a condition of competition in the United States Open Tournament at Forest Hills, New York. Plaintiff Renee Richards sought a preliminary injunction in the New York Supreme Court to enjoin defendants use of the chromosomal test which would have classified Richards as a male.

A substantial body of expert medical opinion was presented to the court as well as to the pertinent legal authorities. The symbolic scales of justice tipped, and despite the fact that the weight of the evidence seemed to be in defendants' U.S.T.A. and W.T.A.'s favor, the New York court found for Renee Richards.

This section will examine both the medical evidence and legal authority presented to the Richards court¹²⁶ within the context of the evidentiary standards required for the issuance of a mandatory injunction in the state of New York. It will be shown that, in light of the evidence presented, there was no basis for granting the injunction which allowed Renee Richards to play in the U.S. Open. Furthermore, it will be shown that within the state of medical science and the legal precedents there is no foundation to support the holding that the chromosomal test was inappropriate to classify the sex of transsexual Renee Richards' as a condition for participation in the U.S. Open Tennis Tournament.

125. The U.S.O.C. submitted a joint Memorandum of Points and Authorities with Defendants U.S.T.A. [hereinafter collectively referred to as U.S.T.A.].

126. An analysis of the *Richards* case will be based upon the affidavits, exhibits and Memorandum of Points and Authorities submitted to the court on behalf of plaintiff Renee Richards and Defendants U.S.T.A., U.S.O.C., and W.T.A. (Index No. 14643/77, N.Y. Supr. Ct.).

Facts

On July 26, 1976, Dr. Renee Richards¹²⁷ submitted an application to the U.S.T.A. for the 1976 U.S. Open¹²⁸ at Forest Hills and a letter to the tournament director¹²⁹ clarifying her application¹³⁰ for the women's singles events at the tournament. In response to Dr. Richards application, the President of the U.S.T.A. was advised by legal counsel to ask Renee Richards to submit to a chromosome test in accordance with the practice of the International Olympic Committee which requires the test as a condition to participation for female competitors.¹³¹

The U.S.T.A. Management Committee subsequently decided that the chromosome test used in the Olympics would be required of all contestants in the 1976 U.S. Open, in order to prevent the introduction of "inequality and unfairness into the Championships".¹³² Dr. Richards did not take the test and was accordingly barred from participation in the 1976 U.S. Open.¹³³ After making

127. Richards' affidavit disclosed that Dr. Renee Richards, nee Richard H. Raskind, an ophthalmologist licensed to practice in the State of New York and earning an annual income of \$100,000.00, underwent a sex reassignment operation in 1975 at age 41. "At which time," she averred, "for all intents and purposes, I became a female, psychologically, socially and physically, as has been attested to by my doctors. I underwent this operation after many years of being a transsexual, a woman trapped inside the body of a man . . . Only for the sake of my continuing healthy mental existence did I undergo the sex reassignment operation." 400 N.Y.S.2d at 267-268. Nevertheless, Dr. Richards was married at one time and has a child by "her" ex-wife. Affidavit of Renee Richards at 2.

As Dr. Richard H. Raskind, plaintiff was an accomplished male tennis player. In 1974 he ranked 3rd in the East and thirteenth nationally in the men's 35-and-over division. Subsequent to her sex reassignment surgery, Dr. Richards continued to play competitive tennis and entered several women's tournaments. She won two tournaments and finished as runner-up in three. Prior to the 1977 U.S. Open, Dr. Richards reached the finals of the women's singles at the Mutual Benefit Life Open played on Aug. 7, 1977 at the Orange Lawn Tennis Club in South Orange, New Jersey. 400 N.Y.S.2d at 268.

128. (Exhibit 2), file number 14643/77, 400 N.Y.S.2d 268. See Gowen Affidavit at 2; 400 N.Y.S.2d at 268.

129. Letter to Mike Blanchard, U.S. Open Chairman, from Renee Richards, (Exhibit 3), 400 N.Y.S.2d 268.

130. Dr. Richards stated that she had been a male at birth and had undergone sex reassignment surgery in 1975. She asserted that in all anatomical respects she was a normal woman and that her passport, birth certificate and all significant documents had been legally changed to "Renee Richards," her legal name. Since the law and medical profession ostensibly regarded her as a woman, she concluded: "I am a woman and entitled to all the legal rights of my sex," and capriciously added, "I intend to pursue my right to play in the women's singles at Forest Hills. Obviously I can't play in the men's event!" *Id.*

131. Gowen Affidavit at 3. See Letter from George Gowen to Stanley Malless, 1976 President of U.S.T.A. (July 27, 1976). (Exhibit 5).

132. Gowen Affidavit at 4. See U.S.T.A. Press Release (Exhibit 7). Gowen, general counsel for the U.S.T.A., stated:

We have reason to believe that there are as many as 10,000 transsexuals in the

this decision, the Management Committee reviewed the question of whether it was fair to women tennis players to permit the entry of transsexuals into womens' tournaments concluding:

While the Committee is sensitive to and respects the rights of individuals to live as they may choose, it believes that a transsexual retains characteristics of his earlier life that may give the transsexual competitive and physical advantages over many women . . . The Committee believes that it would be reasonable to adopt an objective test to determine sex for purposes of athletic competitions restricted to women and that the so-called Olympic chromosome (Barr body) test has a high degree of accuracy and is easily administered without inconvenience or indignity to the individual.¹³⁴

Despite this decision ratifying use of the Barr body test for the U.S. Open, the U.S.T.A. permitted each tournament committee to make its own determination as to whether it should use the chromosome test. Its reasoning was that "an absolute requirement as to the use of the test would be burdensome."¹³⁵ Dr. Richards was therefore allowed to compete in a number of U.S.T.A. sanctioned tournaments in the 1976-1977 tournament year which did not require the chromosome test.¹³⁶ Although successful in these tournaments Richards was unable to qualify for participation in the prestigious U.S. Open due to defendant U.S.T.A.'s failure to rate Renee Richards as a woman tennis professional, a prerequisite for partici-

United States and many more female impersonators or imposters. The total number of such persons throughout the world is not known. Because of the millions of dollars of prize money available to competitors, because of the nationalistic desires to excel in athletics and because of world-wide experiments, especially in the iron curtain countries, to produce athletic stars by means undreamed a few years ago, the U.S.T.A. has been especially sensitive to its obligation to insure fairness of competition among the athletes competing in the U.S. Open, the leading international tennis tournament in the United States. The U.S.T.A. believes that the Olympic type sex determination procedures are a reasonable way to assure fairness and equality of competition when dealing with numerous competitors from around the world. The U.S.T.A. believes the question at issue transcends the factual background of medical history of one applicant. 400 N.Y.S.2d at 269.

133. Gowen Affidavit at 5.

134. U.S.T.A. Position on Transsexuals at 2. (Exhibit 12). Gowen Affidavit at 7. The basis for this conclusion was that: 1) A transsexual playing competitive tennis as a male would have a competitive and training advantage over other women; 2) The male-to-female transsexual would probably have a muscular advantage over women playing only as women, notwithstanding atrophy of the muscles as hormone treatment remains in the control of the individual. 3) The skeleton of a male is not altered by "sex change" surgery. *Id.*

135. U.S.T.A. Position on Transsexuals at 2. (Exhibit 12); Gowen Affidavit at 6-8.

136. For example, Eugene Scott, tournament chairman of the Mutual Benefit Life Open in South Orange, New Jersey, invited Dr. Richards to play in the tournament as a woman because, "I recognize her as a woman." Affidavit of Eugene Scott at 1.

pation in the 1977 U.S. Open.¹³⁷ Consequently, Richards sought a preliminary injunction¹³⁸ barring use of the chromosomal test (which would designate her as a male), "so that I shall be allowed to qualify and/or participate in the United States Open Tennis Tournament as a woman in the Women's Division."¹³⁹

The Richards Decision

On August 10, 1977, Judge Ascione of the Supreme Court of New York, County of New York found for Renee Richards. After a written review of the pertinent medical evidence, affidavits of various professional tennis players and exhibits, the court delivered its opinion which reads in part:

137. The W.T.A. maintains a computerized system to rank professional and amateur women tennis players. Weighted results from all W.T.A. approved events are entered into the system in order to determine the rank of each woman player.

The W.T.A. has requested that each W.T.A.-approved tournament administer the Barr body (chromatin) test and that only those individuals who pass the Barr body test be allowed to participate in the tournament.

The W.T.A. will not knowingly enter into its ranking system the results of a tournament which has not utilized the Barr body test as a condition for participation in the tournament or which admits a participant who has failed the test.

Affidavit of Jerry Diamond (Executive Director of the W.T.A.) at 1-2.

138. This was pursuant to N.Y. Civ. PRAC. §6301 which provides in part:

A preliminary injunction may be granted . . . in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which if committed or continued during the pendency of the action would produce injury to the plaintiff.

To sustain Richards motion for a preliminary injunction under New York law, she was required to demonstrate; 1) a clear likelihood of success on the merits, 2) irreparable injury would result during the pendency of the lawsuit if a preliminary injunction were not awarded, 3) the balance of equities are in plaintiff's favor, and, 4) there is no adequate remedy at law. *Albine v. Solork Assocs.*, 37 App. Div. 2d 835, 326 N.Y.S.2d 150 (1971).

The effect of a preliminary injunction to the instant case was to give Renee Richards the ultimate relief sought, i.e., she would be able to qualify and participate in the U.S. Open without complying with the chromosome test requirement. However, the standards for a preliminary injunction are more strictly employed where the injunction sought would award the complete relief requested if the plaintiff were to prevail on the merits. *Tanzer Econ. Assocs. v. Universal Food Spec. Inc.*, 383 N.Y.S.2d 479, 87 Misc. 2d 167 (1976); *Kaplan v. Scal* 108 N.Y.S.2d 624 (1952); N.Y. Civ. PRAC. §6312.06 (1976). It will be shown that Richards failed to meet this higher evidentiary requirement for equitable relief yet incongruously was able to obtain a mandatory injunction.

The scope of this analysis will be confined to an inquiry of whether Richards established a likelihood of success on the merits, i.e., that the chromosome test was proved by clear and convincing evidence to be unfair and inequitable when used to determine Richards sex for athletic purposes. Therefore factors two, three and four of the requirements for a preliminary injunction (listed above) will not be discussed since they fall within the ambit of equitable jurisdiction rather than the substantive merits of the *Richards* opinion.

139. 400 N.Y.S.2d at 268.

In this Court's view, the requirement of defendants that this plaintiff pass the Barr body test in order to be eligible to participate in the Women's singles of the U.S. Open is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this state (Executive Law, Article 15, Sections 290 et. seq.). It seems clear that defendants knowingly instituted this test for the sole purpose of preventing plaintiff from participating in the tournament. The only justification for using a sex determination test in athletic competition is to prevent fraud, i.e. men masquerading as women, competing against women.

This court rejects any such suggestion as applied to plaintiff. This court is totally convinced that there are very few biological males, who are accomplished tennis players, who are also either preoperative or postoperative transsexuals.

When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconception of defendants must give way to the overwhelming medical evidence that this person is now a female.

This court is not striking down the Barr body test as it appear to be a recognized and acceptable tool for determining sex. However, it is not and should not be the sole criterion, where as here, the circumstances warrant consideration of other factors.¹⁴⁰

In accordance with section 290, subd. 3 and section 296 of the Human Rights Law of the state of New York, the Supreme Court found defendants U.S.T.A., U.S.O.C. and W.T.A. in violation of plaintiff's rights¹⁴¹ and Richards' application for a preliminary in-

140. 400 N.Y.S.2d at 272-73.

141. An application for a preliminary injunction must be based upon a valid cause of action. *Leonard v. John Hancock Mut. Life Ins. Co.*, 118 N.Y.S.2d 170, *aff'd* 281 App. Div. 859, 119 N.Y.S.2d 918 (1953). Richards based her application for injunctive relief upon § 290 and § 296 of the New York Human Rights Law which, among other things, prohibits discrimination on the basis of sex. However, sex discrimination as the foundation for this decision raises portentous questions regarding its validity as a substantive basis for the Richards decision. Transsexuals, terminated from their jobs because they had changed or were in the process of changing sex, have brought suit in federal court basing their cases on Title VII of the 1964 Civil Rights Act. This act prohibits employment discrimination on the basis of sex. The courts have consistently held that no cause of action is stated for sex discrimination since the alleged discrimination is based on a sex *change*. In one case, the trial court, restricting sex to its "plain meaning" stated:

In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term "sex" other than its plain meaning. Accordingly, the Court is satisfied that the facts as alleged failed to state a claim of unlawful job discrimination based on sex. *Grossman v. Bernhards Township Bd. of Educ.*, 11 Empl. Prac.

junction was granted. By granting the relief requested, the court implicitly held that Richards had satisfied the requirements for a preliminary injunction, i.e., that Richards had shown a likelihood of success on the merits. However, an examination of the medical evidence submitted to the court will show that Richards failed to establish the strict requirements for injunctive relief, despite a finding to the contrary.

The Medical Arguments

The court's application of the medical evidence was both superficial and fallacious; in disregard of many of the fine yet crucial, medical issues implicit to a determination of the sex of Renee Richards. The written opinion of the court made no reference to any particular medical information which was significant in their ultimate disposition of the case. The court merely stated that the circumstances warranted consideration of factors other than the chromosomes to determine Richard's sex.¹⁴² What the specific circumstances were and which factors required consideration were not included in the opinion. Further, an analysis of the medical information presented and the state of that art reveals major discrepancies in the medical evidence presented by Richards which did not meet the strong showing of proof required for a mandatory injunction. Rather, it seems apparent that the court based its conclusion upon the emotional appeal of Renee Richards' case, triggered by her unusual and difficult transition from one sexual role to the other.¹⁴³

Dec. (CCH) ¶ 10,686 at 6889 (D.N.J. 1975) *aff'd mem.*, 538 F.2d 319 (3rd Cir. 1976), *cert. denied*, 429 U.S. 897 (1976).

Another court has noted that had Congress intended to prevent discrimination on the basis of transsexualism the Act would have specifically included discrimination based on "change of sex" or "sexual preference." *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975) [on appeal to 9th Circuit]. *Accord Holloway v. Arthur Anderson & Co.*, No. 76-2248 (9th Cir., Dec. 23, 1977); *Powell v. Read's Inc.*, 436 F. Supp. 369 (D. Md. 1977).

As a corollary to the reasoning used in the Title VII cases, W.T.A. similarly argued that there was no legislative history or statutory language indicating an intent on the part of the New York legislature to include transsexuals within the ambit of the New York Human Rights Law. Consequently W.T.A. asserted that the Supreme Court of New York should not ascribe any meaning to the term "sex" other than its plain meaning, W.T.A. Memoranda of Points and Authorities at 13-14, and therefore these statutes were inadequate as the basis for awarding injunctive relief as they were not intended to apply to transsexuals being discriminated against on the basis of a sex change. At the very least this issue entailed consideration by the court, however, it too was ignored in the court's opinion.

142. 400 N.Y.S.2d at 273. See text accompanying notes 140-141, *supra*.

143. For example, note the sympathetic posture of this decision:

When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the over-

First, the court based its conclusion upon the testimony of Drs. Money, Granato, Rubbell and Wollman (Richards' experts) who concluded that Richards was a woman and must be classified as such.¹⁴⁴ In contrast, Dr. Federman (the medical expert for U.S.T.A. and W.T.A.) took the more accurate medical position that Dr. Richards was not a biological female; rather, the sex reassignment process had merely produced a simulation¹⁴⁵ of the female sex and therefore Richards still had the essential chromosomal composition of a male.¹⁴⁶ As previously discussed, the sex reassignment procedure has never been regarded by medical science as one which changes the "core" sex of an individual but is a procedure which alters physical appearance so that it will conform to psychological orientation. In this respect Richards' authorities deviated from common medical opinion for the "widely held conclusion of modern medicine" would be that transsexual Renee Richards was not a biological female as Richards argued.¹⁴⁷ Rather, the opinion of Dr. Federman was the more complete and accurate statement of Renee Richards' status. However, Dr. Federman conducted no medical examination of Richards (unlike Richards' experts), relying solely upon the papers and affidavits submitted by Dr. Richards¹⁴⁸ to formulate his opinion. Consequently, the Supreme Court of New York found Dr. Federman's affidavit limited in probative value to a general consideration of the applicability of the Barr test¹⁴⁹ and held that the "overwhelming medical evidence would indicate that Renee Richards is female" ¹⁵⁰

Despite the probative limitation placed on Dr. Federman's testimony, his opinion was in accord with the stance of modern medi-

whelming medical evidence that this person is now a female.

400 N.Y.S.2d at 272.

144. *Id.* at 271-72.

145. Some experts contend that the transsexual tries to simulate the female sex psychologically as well as anatomically. These authorities feel that the urge of a transsexual male to be "all woman" is normally the result of a shallow and distorted view of what a woman is really like socially, sexually, anatomically and emotionally. Worden & Marsh, *Psychological Factors in Men Seeking Sex Transformation*, 157 JAMA 1292, 1293 (1955) (cited in Meyers, *Problems of Sex Determination and Alteration*, 36 MEDICO-LEGAL J. 174 (1968).

¹⁴⁶In others [transsexuals], however, there is the need to overdo and exaggerate the feminine appearance and thus their behavior becomes a caricature of women's behavior. This clinical impression is confirmed by psychological studies which show that the male transsexual as a group score higher femininity scales than a control group of normal women." Pauly, *Manifestations of Male Transsexualism* in GREEN & MONEY, at 44.

146. 400 N.Y.S.2d at 271-72.

147. *Id.* at 272.

148. Federman Affidavit at 2.

149. 400 N.Y.S.2d at 269.

150. *Id.*

cine, in contravention to the position promulgated by Richards' four medical experts. Although it appeared from the onset that the "overwhelming medical evidence" indicated that Richards was a female (since four out of five experts testified to that effect), the evidence was technically imprecise. It would have been more appropriate for the court to consider the quality of the evidence in weighing Dr. Federman's testimony as opposed to the quantity of evidence.

Secondly, Drs. Money and Wollman criticized the Barr body test as being medically inaccurate for individuals with chromosomal anomalies and therefore inequitable for purposes of excluding individuals on the basis of sex.¹⁵¹ Richards' doctors had been prejudicially selective in their attack, criticizing the inaccuracy of the Barr body test while ignoring the fact that the Barr test was merely a screening device that formed a part of the composite chromosomal test at issue. The Barr body test was never intended by the U.S.T.A. or W.T.A. for exclusive use, but was to be paired with the karyotype test.¹⁵² Although Dr. Federman conceded the inaccuracy of the Barr body test, he established that the karyotype test, used in conjunction with the Barr body test, is 100% effective in revealing chromosomal anomalies.¹⁵³

By selectively focusing upon the Barr body test, Richards appeared to purport a sound legal argument and avoided the real issue, the soundness of the composite chromosomal test. The court disregarded this discrepancy, holding that "although the Barr body test is an acceptable tool, it should not be the sole criteria for determining sex".¹⁵⁴ The defendants had never contested this finding but had come to the same conclusion as the Richards' court. The defendants contended that the Barr body test was not an absolute criterion, but if abnormal, had to be followed by the definitive karyotype test. Clearly then the Olympic chromosomal test of sex was an accurate indicator of Richards' sex for athletic purposes, but had to be considered in its entirety, and not solely on the basis of the screening component of the test (i.e. the Barr body test).

Thirdly, Drs. Money and Granato attested that Renee Richards

151. *Id.* at 271-72.

152. Defendants U.S.T.A., U.S.O.C., and W.T.A. specifically provided for use of the karyotype test in the event the results of the Barr body test were inconclusive: "If a player fails the Barr body test and requests further consideration, the W.T.A. will permit the use of the karyotype test." Affidavit of Jerry Diamond at 2.

153. 400 N.Y.S.2d at 270.

154. *Id.* at 273.

had no competitive advantage over other women as her muscle-to-tissue ratio was that of a woman.¹⁵⁵ Dr. Federman disagreed, arguing that the effect of sex reassignment is partial and Richards still had residual male characteristics which could give her a competitive advantage. Therefore, he concluded that the Barr body test was appropriate to determine Richards sex since it identifies the chromosomes that reflect the nature of those immutable physical characteristics still housed in the altered body of the transsexual.

These contentions concerning the possible competitive advantage Renee Richards might have over her competitors were ignored by the court which found that the only justification for the Barr body test was to prevent fraud in the form of men masquerading as women. Evidently, unfairness in the form of an unnatural competitive advantage was found to be inconsequential. However, fraud was one, but not the sole concern that militated towards adoption of the test. The primary purpose for which the Barr body test was chosen by the I.O.C. and then the U.S.T.A. and W.T.A. was to prevent unfairness in whatever form it might assume — whether in the shape of a simple masquerade, chromosomal anomaly or true transsexual.¹⁵⁶

The opinion reveals that the court ignored U.S.T.A.'s and W.T.A.'s contention that fairness in athletic competition was of paramount importance, and juxtaposed the parties' intent with an intent the court subjectively deemed more prudent (although factually discordant with the evidence submitted) i.e., that the Barr test was relevant only to prevent fraud in the athletic setting. The court was not warranted in disregarding the overwhelming evidence showing that unfairness could result if transsexual Renee Richards were allowed to compete in the U.S. Open and that the Barr test bore a reasonable relationship to that end. By ignoring the unfairness issues pertinent to athletic competition, the court rendered obsolete a consideration of the inequities a replacement test might have in sex segregated sports. For example, the psychological/phenotype test would allow a transsexual with an innate physical advantage to compete against others. Hay,¹⁵⁷ writing for the Medical Commission of the 1972 International Olympic Committee, Explanada, Mexico, reported that there is a substantial percentage difference in effort and endurance between the sexes. And, as pre-

155. *Id.* at 271-72.

156. *Id.* at 272.

157. Hay, *supra* note 15, at 998.

viously cited,¹⁵⁸ other studies on male animals indicate that where castration and hormonal changes are artificially induced, there are traces of residual masculine characteristics in the altered animal that consist of, but are not limited to, a higher level of strength and aggression than the level normally maintained in the female. All this bears witness to the fact that an altered transsexual is likely to retain the inherent physical characteristics associated with his/her previous anatomical configuration, which will give him/her a competitive advantage over other participants. Since biological differences influence athletic performance, the chromosomal test, which is reasonably related to the biological characteristics of an individual, is preferred over the psychological/phenotype test, which merely indicates the psychological orientation and physical appearance of the transsexual.

The defendants had shown that the chromosomal test was an objective and acceptable tool for determining sex as it indicates the biological differences which have an uncontested influence on athletic performance. The chromosomal test was not promulgated as an arbitrary requirement, but was reasonably related to the objective of the U.S.T.A. and W.T.A. to prevent unfairness, a genuine exigency on the basis of the medical evidence and the state of that art. Therefore, it can be seen that the court erred in holding that implementation of the Barr body test was merely a gesture designed to discriminate against Renee Richards.¹⁵⁹

Lastly, the court based its decision for Richards upon the speculation that there were very few biological male tennis players who were either preoperative or postoperative transsexuals.¹⁶⁰

In fact, the evidence presented established a contrary finding, that there are as many as 10,000 transsexuals in the United States.¹⁶¹ Furthermore, as mentioned previously,¹⁶² Pauly has reported that transsexualism is far more prevalent than the figures indicate since any statistical count is based only upon those transsexuals who seek treatment for their syndrome.

Assuming for a moment that the court was correct in asserting that there are few transsexual tennis players of the caliber of Renee Richards, there nevertheless must be transsexual golfers, gymnasts,

158. *See supra* note 38.

159. 400 N.Y.S.2d at 272.

160. *Id.*

161. *See supra* note 132.

162. *See supra* note 4.

runners, and other transsexual athletes who would enjoy a competitive advantage if they too were classified as female by the psychological/phenotype test. Certainly these issues will be raised again. The role of the Richards' court was not merely to decide one case, but rather, to set guidelines and precedent for future cases — a task the court failed to undertake when it made its' superficial examination of the medical issues attendant to a determination of the legal sex of transsexual athlete Renee Richards.

The Legal Arguments

Richards asserted that, in accordance with the legal precedents dealing with transsexuals, she must be classified as a woman. She relied upon *M.T. v J.T.*¹⁶³ which held that a male-to-female transsexual subsequent to sex reassignment surgery was a member of the female sex for marital purposes, despite the fact that the transsexuals chromosomes were that of a male. There, the New Jersey court stated that the chromosomal test of sex did not serve to prevent fraud where "in actuality, she [the transsexual] is doing her utmost to remove any false facade"¹⁶⁴ by seeking to be classified as female when she appeared in every regard to be female. Richards argued that she too was a female in all respects, with the exception of her chromosomes as demonstrated by the medical evidence.¹⁶⁵ Since she presented no danger of fraud or unfair advantage, she asserted that she too should be classified as a woman.

Had the court examined *M.T. v. J.T.*¹⁶⁶ (a case Richards claimed was "strikingly similar to the one at bar")¹⁶⁷ it would have seen that the issue there concerned the validity of a marriage between a postoperative male transsexual and not the legal sex of a transsexual for athletic purposes. The court expressly held that where a transsexuals' anatomy conforms with the person's gender, psyche, or psychological sex, then sexual identity must be governed by the congruence of these standards.¹⁶⁸ This decision reflected both the deep-rooted public policy prohibiting dissolution of a functional marriage

163. 140 N.J. Super. 77, 355 A.2d 200 (1976). This case litigated the validity of a transsexual's marriage in an action for support and maintenance brought by the transsexual wife. See notes 80-83 & accompanying text *supra*.

164. *Id.* at 88, 355 A.2d at 210.

165. Plaintiff's Memorandum of Law in Support of the Application for a Preliminary Injunction at 6.

166. *Supra* note 163.

167. Plaintiff's Memorandum, *supra* note 165, at 5.

168. See *M.T. v. J.T.*, *supra* note 80. See also notes 80-83 & accompanying text *supra*.

and a liberal trend acknowledging the marital rights of transsexuals within the confines of family law. However, it did not hold that male transsexuals were to be categorized as women for all purposes. Indeed, the court expressly stated in dictum that the psychological/phenotype test was inadequate for athletic purposes:

It is true that the anatomical test, the genitalia of an individual is unquestionably significant and probably in most instances indispensable . . . For other purposes however, where sex differentialism is required or accepted, such as for . . . participation in certain regulated sports activities . . . other tests in addition to genitalia may also be important.¹⁶⁹

Furthermore, in consideration of the high standard of proof necessary for injunctive relief, this New Jersey case should have held little precedential value to the New York court. Had the court examined the parties' contentions, it would have found that within the context of the marital relationship, conflict exists as to whether a transsexual can actually change her sex through reassignment surgery, based on the medical authority presented in *Corbett*.¹⁷⁰ On the basis of that decision (which nullified a marriage between a male-to-female transsexual and a normal male on the ground that a valid marriage can only be between persons of opposite sex) defendants asserted that "a medical operation cannot change the sex of a transsexual".¹⁷¹

Richards also argued that *In the Matter of Anonymous*¹⁷² and *In re Anonymous*,¹⁷³ cases where a transsexual was allowed to change a male name to a female name, indicated that a psychological test should be applied when classifying the sex of a postoperative transsexual for athletic purposes. This test would have the effect of classifying Richards as a woman. She argued that no danger of fraud existed since social sex or gender would conform to her harmonized physical status. Richards further asserted that the chromosome test was both unrealistic and inhumane as a determinant of sex based

169. 140 N.J. Super. at 82, 355 A.2d at 209.

170. [1970] 2 All E.R. at 33.

171. Memorandum of Defendants United States Tennis Association, Inc., and U.S. Open Tennis Championship Committee in Opposition to Plaintiff's Motion for a Preliminary Injunction at 26.

172. 293 N.Y.S.2d 834, 57 Misc. 2d 813 (1968) (lower court lacked jurisdiction to order birth certificate change but ordered change of name while considering attendant issues). See notes 73-75 & accompanying text *supra*.

173. 314 N.Y.S.2d 668, 64 Misc. 2d 309 (1970) (court granted an application for a change of name from an obviously male name to an obviously female name). See notes 75-78 & accompanying text *supra*.

upon the holding of Judge Pecora in *In the Matter of Anonymous*:

[S]hould the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation. I think not.¹⁷⁴

Consequently, Richards urged adoption of the psychological test contending that use of this test was equally applicable to the case at bar.

Had the court examined these cases or the defendants' arguments it would have seen that they were specifically limited to their facts and had no application to the issues pertaining to sex classification of transsexual athletes.

The decision in *In the Matter of Anonymous* which promulgated the psychological test of sex for a transsexual seeking a change of name was expressly limited by Judge Pecora to changes of a statistical nature.¹⁷⁵ And *In re Anonymous* was also limited in scope to a statistical change of sex designation on a birth certificate and was therefore ineffectual to support the contention that Richards' sex had in fact been changed.

A further examination of *In re Anonymous* discloses that Richards' application of that case was incorrect both factually and legally. In that case, the court expressly stated that the order granting permission for the petitioner's change of name was not to be used as evidence that the sex of petitioner had in fact been changed.¹⁷⁶ Consequently, U.S.T.A. commented in its memorandum that the factual data offered by Richards indicating a change of name on her birth certificate, passport and California Driver's License were meaningless as evidence of a change in sex.¹⁷⁷

Indeed, W.T.A. added that the New York *In re Anonymous* court indicated in dictum the inadequacy of the psychological/phenotype test for determining the sex of participants in sex-segregated athletic events:¹⁷⁸

174. 293 N.Y.S.2d at 838, 57 Misc. 2d at 817. See Plaintiff's Memorandum, *supra* note 105, at 9.

175. *Id.* at 835, 57 Misc. 2d at 813.

176. 314 N.Y.S.2d at 668-70, 64 Misc. 2d at 309-10. See note 77 & accompanying text *supra*.

177. Memorandum of Defendants, *supra* note 171, at 26-27. See Affidavit of Renee Richards at 4.

178. However, W.T.A. ignored the fact that the *Anonymous* court was merely taking judicial notice of past Olympic practice rather than determining the propriety of the Olympic

What the true test of a person is, commonly is easy of determination by the application of accepted tests based on visual inspection. Occasionally refinements of these tests are required, as have been reported to have occurred during the Olympic games when chromosome testing was applied to contestants whose sex was disputed in contests reserved for women.¹⁷⁹

U.S.T.A. indicated¹⁸⁰ that *Matter of Hartin v. Director of Bureau of Records*¹⁸¹ was not supportive of Richards' assertion that she was a woman. There the court upheld a Board of Health decision granting a change of name on a birth certificate for a transsexual. The court held that the main purpose of reassignment surgery was not to effectuate a change of sex since it could not change the body cells governing sexuality,¹⁸² but was done to alleviate the patient's mental condition. Additionally, the New York case of *Frances B. v. Mark B.*,¹⁸³ held that a female-to-male transsexual despite sex reassignment surgery was still a female in fact and therefore her marriage to a woman was invalid. Consequently, U.S.T.A. concluded that the legal precedents had consistently failed to hold that a transsexual subsequent to sex reassignment surgery had converted sex.

W.T.A. and U.S.T.A. conceded that some of the cases had allowed a change of sex designation for gender-blind social ascriptions such as name changes and changes of legal identity while another case, *M.T. v. J.T.*,¹⁸⁴ had even upheld the right of a transsexual to marry. However, they asserted that these previous cases were distinguishable from the present case since none of the former dealt with situations where the effect of classifying a male-to-female transsexual would materially affect the rights of other persons. U.S.T.A. and W.T.A. argued that classifying Richards as a female for athletic purposes would materially affect the rights of her female competitors since the medical evidence indicated that she was likely to have a competitive advantage.

Nevertheless, the court, which failed to rely on *any* of the cases cited, concluded:

When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity

test and mandating what shall be done in the future with regard to transsexuals in athletics, an issue not before the *Anonymous* court.

179. 314 N.Y.S.2d at 668, 670, 64 Misc. 2d at 309, 310.

180. Memorandum of Defendants, *supra* note 171, at 22-23.

181. 347 N.Y.S.2d 515, 75 Misc. 2d 229 (1973). See notes 78-79 & accompanying text *supra*.

182. *Id.* at 517-18, 75 Misc. 2d at 232.

183. 355 N.Y.S.2d 712, 78 Misc. 2d 112 (1974).

184. *Supra* note 163.

to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.¹⁸⁵

Had the court consulted the legal precedents they might well have concluded that Renee Richards is not and would not be legally classified as a female in the state of New York by the psychological test for other than statistical purposes. Nevertheless, the court concluded that Renee Richards was a woman in accordance with the *medical* evidence and without regard to the legal precedents. Ostensibly, the psychological/phenotype test was deemed an appropriate determinant of this fact.

Renee Richards went on to play tennis in the 1976 U.S. Open at Forest Hills.¹⁸⁶ However, this result was not justified within the context of the evidentiary requirements for injunctive relief since it was dubious that Richards had shown a likelihood of success on the merits. As one New York court has stated:

Injunction is a drastic remedy; the granting of a mandatory injunction, in the first instance, is rare. Even an injunction pendent lite will be refused unless a clear and convincing case is made out.¹⁸⁷

The medical evidence revealed discrepancies on a number of major points regarding the utility of the chromosome test to determine the legal sex of transsexual athlete, Renee Richards. First, there was conflicting authority on the issue of whether or not Richards was a female in fact or merely a simulation of a woman. Second, there were discrepancies concerning whether or not Richards had a competitive advantage over other female participants because of innate physical characteristics. Third, there was conflicting evidence on the accuracy of the chromosomal test. Fourth, there was unfounded speculation, with no statistical documentation, on the number of transsexuals in the United States, a factor which appeared to be influential to the ultimate outcome of the case.

As shown, a virtual cornucopia of conflicting medical and legal evidence had been presented which militated against the award of injunctive relief. The legal authorities cited by Richards as evidence that her sex should be classified by a psychological test were not

185. 400 N.Y.S.2d at 272.

186. Generally a preliminary injunction is issued to preserve the status quo pending a final determination of the merits of the cause of action after a full hearing. Here plaintiff Renee Richards sought a mandatory injunction and obtained the full relief requested at the injunction stage. Consequently no final hearing ensued and stipulated dismissal was entered by the parties.

187. *Kaplan v. Scal*, 108 N.Y.S.2d 624 (1952).

only discordant, but distinguishable on their facts so as to render them inapplicable to the issues attendant to classifying Richards' sex for athletic purposes. In fact, the majority of Richards' authorities held that Richards would not be classified as a female by the psychological test for other than statistical purposes. Indeed, it is patent that Richards was not able to establish in a clear and convincing manner a likelihood of success on the merits in order to qualify for the mandatory injunction requested. Nevertheless, the New York Supreme Court awarded the requested injunctive relief. It is evident that in balancing the symbolic scales of justice, the court attributed greater weight to humanistic considerations than evidentiary standards.

Conclusion

The biblical dichotomy of the sexes has been a fundamental assumption recently challenged by modern medicine. The sexes are not discrete, but rather composed of a mosaic of factors which may blend into a spectrum of individuals with chromosomal and hormonal anomalies. At the extreme end of this spectrum is the transsexual presenting a myriad of novel legal problems that require an examination of the subtle nuances of sexuality in order to facilitate their smooth transition into society without impairing the rights of others. As one court has stated in recognizing a change of sex on the part of a transsexual for the limited purpose of marriage:

. . . Such recognition would promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.¹⁸⁸

The scales of justice failed to strike such a harmonious balance in *Richards v. U.S.T.A.* when the New York Supreme Court concluded that transsexual Renee Richards should be classified by a psychological test of sex for purposes of competing in the U.S. Open Tennis Tournament.

On a superficial level, the Richards decision does not seem to impair any moral precept, principle of public order, or societal interest. Rather, it seems relatively innocuous, merely lifting the yoke imposed by the chromosome test and allowing Renee Richards to play tennis. Yet within the context of the athletic milieu, this decision stands to impose upon the fairness and integrity of competitive sports.

188. *M.T. v. J.T.*, *supra* note 163, at 211.

The basic maxim of athletic competition in accordance with the International Olympic Committee, is that sport should involve the matching of skill and strength based upon the natural capabilities of participants.¹⁸⁹ As shown, the relative performance of a female competitor will be in jeopardy when paired with a male transsexual competitor. Regardless of the fact that Renee Richards has not devastated womens' tennis,¹⁹⁰ she nonetheless possesses certain immutable physical characteristics unique to "her" male sex which affords her an access to qualities not available to other participants.

The threat that competitive sports may be impaired by the Richards' holding has been shown to be more than idle sophistry. Although transsexual Renee Richards is a novel anomaly to the American sports scene, she represents a small but ever-increasing group of transsexual athletes or those with chromosomal disorders that have appeared in other nations. Inevitably other transsexuals will want to participate in competitive athletics in this country and they too will need to obtain a legal determination of sex for athletic purposes.

It is evident that the Richards' court was not concerned with the impact this decision might have upon competitive tennis and perhaps other sex-segregated sports as well, but their concern focused upon the desire of this one plaintiff, Renee Richards, to compete in the U.S. Open Tennis Tournament. The role of the Richards' court should have extended beyond a decision for Renee Richards. Rather, the court should have formulated a decision which would have provided consultative and precedential value to future courts called upon to balance the divergent legal and medical authority, the needs of the transsexual athlete, and the social impact such a decision will have.

As discussed, the Richards' court ignored pertinent medical data, failed to distinguish the legal authorities, and ignored the evidentiary standards required for injunctive relief in New York. Although substantively deficient, the Richards' decision will nonetheless influence future courts called upon to decide the legal sex of a transsexual athlete. The danger of the Richards' decision is that it does not have a substantive basis in fact, but will nevertheless reverberate far beyond the holding which allowed Renee Richards to compete in the 1977 U.S. Open.

189. Games of the XXI Olympiad, Montreal 1976, International Olympic Committee Medical Controls at 15.

190. Affidavit of Renee Richards at 3.

